POLICE POWERS IN QUEENSLAND

This paper reflects the joint effort of the Office of the Minister for Police and Emergency Services and the Criminal Justice Commission. It was prepared with a view to generating constructive debate within the wider Queensland community.

All individuals and organisations interested in the process of law enforcement, the protection of the community and the preservation of the rights of the individual are invited to consider the entire issue of police powers and make their views known through submissions.

It should be a matter of concern to everyone in the community that the increasing level of crime must be curtailed. Two essential elements in achieving this goal are the support of the community and the availability to police of the appropriate tools to investigate, prevent and reduce crime.

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INTRODUCTION

The Threshold Questions

The subject of police powers is and will always be a controversial one. This is demonstrated by the fact that it has been the topic of heated debate in most democratic societies for a long time. The arguments do not appear to have come any closer to resolving some of the philosophical issues underlying the problem. The consistent theme which has arisen during the last two decades is the need to achieve a balance between the two competing interests of the public - the need to protect the rights and liberties of the individual citizen and the need to ensure that offenders are brought to justice.

In addressing this issue of fundamental balance, the Royal Commission on Criminal Procedure in the United Kingdom (*Report of the Royal Commission on Criminal Procedure* 1981, hereinafter referred to as the Philips Report 1981) raised the following questions:

- Can there be in any strict sense an equation drawn between the individual on the one hand and society on the other?
- Is the balance some sort of social contract between the individual and society?
- What are the rights and liberties of the individual which are assumed to provide part of the balance?
- Who gives them and what justifies them?
- Are they all of equal weight; all equally and totally negotiable or are some natural, fundamental, above the law, part of the human being's birth right?

On the other side of the scale, especially in an increasingly heterogeneous and individualised society, further questions arise:

- How is the interest of the whole community to be defined with any useful precision?
- Where does one see, and where do the police see, the role of the police being applied?

These are just some of the many questions which the community must address. Furthermore, these questions must not be examined and answered in isolation, but as part of the way society functions.

Realistically, it may not be possible to completely eliminate crime. However, it is possible to take steps which may assist in the apprehension of criminal offenders and thus contribute to the minimisation of the commission of criminal offences. Those steps include reappraisal of existing investigative laws.

The Committee on Criminal Procedure in Scotland (*Report of the Committee on Criminal Procedure in Scotland* 1975, hereinafter referred to as the Thomson Committee Report 1975) addressed this point when it reported:

> "It is . . . necessary for the protection of the police as well as of the citizen that the law should be clear. It is also necessary that it should be so framed as to allow police to perform legally whatever functions in the investigation and prevention of crime the public regard as proper."

A Police Service equipped with appropriate and balanced policing authorities will operate more effectively and efficiently in the interests of the community.

Obviously, there will be times when some minor inconvenience will be caused to some citizens through major police investigations. For example, following an armed robbery or an abduction it may be necessary that police set up roadblocks in order that the offender may be quickly apprehended. During these times a citizen driving his/her vehicle along a street where a roadblock has been established may expect some minor traffic delay. However, any such delay must be considered in light of the common good which will prevail should an offender be caught and arrested as a result of that roadblock.

All policing authorities are under review. Consequently, members of the public are asked to contribute submissions on appropriate police authority considered necessary to enhance the protection of the community generally.

Historical and Philosophical Context of Police Powers

In order to put the police powers debate into context, it is necessary to understand the historical and philosophical framework of our criminal justice system which is derived from the English legal system.

It was in the seventeenth century that the criminal trial was established as accusatory in character. However, during the eighteenth and early nineteenth century, the economic and social upheaval that occurred in England resulted in an upsurge in crime. The response to this upsurge was for the government to threaten the use of criminal sanctions as a weapon to maintain order and on such a massive scale as soon to dominate the criminal justice system as a whole.

> "Diaries, letters and impressions of continental travellers in England in this period, some of them lawyers of wide experience, show remarkable unanimity in expressing both horror at the harshness of the criminal law and mingled amazement and admiration for the liberality with which irregularities in criminal procedure were used by the courts to soften the full rigour of the law and give broad expression to public unease about the morality of imposing sentences disproportionate in their severity." (Radzinowicz 1981, p. 6)

Towards the middle of the nineteenth century, after the establishment of the new police structure, emphasis began to be placed on defining criminal procedures and on regulating the relationship of the individual with the authority of the state. As society became increasingly complex and individuals became more organised, the power of the state grew. The individual found it more difficult to organise for his/her own protection and began to look to the state for protection. In order for the state to provide protection it was necessary for the state to have more powers but when granting these powers, the individual also feared the misuse of powers given to institutions of the state.

And so, the need to define the rights of the individual assumed an urgency and nowhere was it more important than in the area of criminal justice.

One of the earliest formulations of guide-lines to protect the rights of the individuals were the Judges' Rules drawn up in 1912. These rules were created for the guidance of police officers in the interrogation of persons during the investigation of crime.[1]

Throughout the twentieth century this idea of consciously seeking to define a balance between the rights of individuals and the security of society was constantly addressed and the debate took a more philosophic turn in the early 1970's.

The Philosophical Aspects of the Debate

The eleventh report of the Criminal Law Revision Committee (1972) was the subject of extensive debate both in public and in Parliament in 1973 and 1974 in the United Kingdom. The report looked back over the development of the criminal justice system and determined that the improvements that had been made in the area of criminal law tended to favour the defence, and that some adjustment was needed to combat increasing crime. Accordingly, the report proposed a restriction on the "Right to Silence". The right entitles a suspect to refuse to answer any questions, and prohibits the judge or the jury from drawing any adverse inference against the suspect for exercising that right.

The Committee proposed that the suspect be entitled to remain silent, however, they proposed that it be permissible to draw an adverse inference from the failure of the suspect to answer questions at the time of interrogation.

The Committee based their argument on the view that in pursuit of "the right result" not even the right to silence was to be seen as a unique or invariable right but was to be treated as one of a set of procedures which could and should be modified.

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1 The Judges' Rules do not have the force of law in Australia. However, they are taken into account in considering whether confessional statements made by persons charged with crimes ought to be admitted in evidence.

This utilitarian approach was opposed by many who protested that the Committee was treating the matter in too narrow a sense and that in reality the right of silence formed a vital issue in the whole constitutional relationship in a free society between the individual and the state. Lord Devlin said:

> "So great is and always has been our horror that a man might be questioned, forced to speak and perhaps condemn himself out of his own mouth, that we grant to everyone suspected or accused of crime at the beginning, at every stage and until the very end, the right to say, 'Ask me no question. I shall answer none. Prove your case'." (Philips Report 1981, p. 9)

This group went on to argue that basically an individual's rights in the criminal process had to be related to an understanding of what the individual's relationship to government ought to be in a free, democratic society, and that each step in the criminal process should be judged not only as a means to the goal of achieving a reliable verdict, but also as part of a system determining how free persons, including suspects in the police station, at all stages ought to be treated (House of Lords Official Report 1973, columns 1546-1678; House of Commons Official Report 1974, columns 891-998).

Whilst one group saw the right as open to variation, and another saw it as an inalienable right of the individual, yet a third group viewed the right as negotiable, but only in terms of an associated and considered use of checks and safeguards.

The philosophical approach of each of these groups was so opposed, it seems impossible to reconcile the competing interests. Numerous commissions and committees since then have tried to do so. Perhaps one of the most important factors to have come to light in this search for balance, is the necessity for each person to consider these issues as forming part of an interconnected criminal justice system. With each addition to the police power, there is a curtailment of the individual's rights and liberties which have developed over the centuries. It is the maintenance of these rights and liberties that forms the foundation of our criminal justice system. If it is considered necessary to increase the police power in any one area, the decision to do that must be made with regard to the effect of that increase on the foundations of our criminal justice system. The fundamental rights that support the system cannot just be whittled away and society still expect the system to function as a whole. As the Philips Royal Commission pointed out, if each separate part of pre-trial procedure is inspected to see if it is working, and a package of changes devised piece-meal to deal with any parts found to be defective, it would be difficult to see how such a package could constitute an appropriate general response to the needs of today's society in respect of the arrangement as a whole (Philips Report 1981, p. 12).

In any submission for change to one part of the arrangements, adequate account must be taken of the likely consequences for other parts.

Increase in Crime and Calls for More Police Powers

The call for increased police powers has frequently rested on the claim that the community is facing an increased tide of crime and that an increase in police powers will stem that tide by increasing the rate at which crime is detected and therefore further crimes will be deterred. The problem with this argument is there is little or no empirical evidence either to support or deny it. The use of crime statistics in support of this argument has been criticised for needing "some validity and consistency" (Freckleton & Selby 1988, p. 5) and it has been said that "in a debate about police powers that is so critical to our society, the statistics that are used are not impartial or authoritative" (Freckleton & Selby 1988, p. 6).

A further problem is that there is a paucity of anecdotal evidence of police pointing to actual cases where the existence of additional police powers could without doubt have solved the crime. It is impossible to guess what amount of crime, if any, would be deterred by any particular increase in police power and therefore it is impossible to find any evidence to support the contention.

Bearing in mind these limitations, one can attempt to assess the need for police powers, by identifying the crimes that are increasing in our community and the crimes for which the clear-up rate is unsatisfactory. Having identified these crimes, it is necessary to look at some strategies for reducing the number of offences and increasing the clear-up rate. In this respect it should not be assumed that an increase in police powers is the only available strategy - there are social constraints and controls that may be effective. The most difficult stage is the evaluation of the various strategies in terms of their ability to reduce the incidence of and increase the solution of crimes. A major consideration underlying this evaluation is the maintenance of an appropriate balance between individual rights and police powers.

The Approach of This Paper

This paper raises issues concerning both the need for and usefulness of existing police powers and the need for and usefulness of any new and/or additional powers. When considering these issues, it is important that they be examined as part of a system - the granting of one power may do away with the need for another power and the removal of one power may necessitate the granting of another. While many of the issues raised may appear simple at first glance, they may have far-reaching consequences for other parts of the criminal justice system. Every effort is made to try to tie up the inter-relationships, but because of the multitude of issues and the complexity of the system, there are a number of constraints. However, readers are urged to bear this in mind and to think about the various issues from that perspective.

The following does not attempt to be an exhaustive statement of the police powers that currently exist in Queensland or in other jurisdictions. Nor is the extent of discussion of each topic raised to be taken as a measure of its relative importance. An exhaustive study of police powers is beyond the scope of this paper.

However, bearing that in mind, the community is asked to consider the following questions in relation to each of the powers referred to throughout the paper:

- **Is there a demonstrated need for the use of the power?**
- **If there is a demonstrated need, how serious must be the crime to justify the use of the power?**
- **At what stage of the investigative process should the power be available?**
- **Who should be able to authorise the use of the power - a senior police officer, judicial officer etc?**
- **What procedures and safeguards should accompany the granting of the power?**
- **What should be the consequences of a failure to comply with the procedures set down?**

These are just a few of the matters that must be considered in relation to the existing powers and to any proposed extension of police powers. However in the analysis of the need for more police powers, consideration should be given not only to the use of such powers in enhancing the investigation and prosecution of crime, but also to the social values that must form part of the picture.

Clifford (1981, pp. 4-5) said:

> ". . . So the need for regular trading between controls to maintain freedoms and freedoms jeopardised by controls, is the heart of democracy. The give and take to obtain optimum liberty is a conflict of compromises. The political struggle no less than the intellectual conflict could probably be traced to pre-history and it will no doubt accompany us into the 21st century.
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> Whatever might have been the devices used to achieve a balance at different periods of our democratic history it is unthinkable in a modern industrial and urbanised society to even begin to approach it without some kind of formal control. This we believe to be necessary to protect rights and contain abuses. However distasteful the function, most people today acknowledge the need for policing. Policing should not therefore be regarded as inimical per se to human or civil rights; it is the only way to protect those rights for everyone.
>
> Unfortunately the problem does not end there and never has ended in such a simple statement of principle. The difficulties arise when the 'protection' begins to stifle the exercise of the rights by people who are better educated, perhaps more affluent and generally sensitive to rights - rights which, in relative terms, may have become broader than they were once supposed to be. Who then is to assess the appropriate and acceptable levels of control? It is this uncertainty about how far the police should be allowed to go which exercises civil rights movements. It is this problem posed in the form of restraints, which the police in Britain are contemplating profoundly after being blamed by some for provoking the youth riots . . . It is this unresolved issue which is the delight of the media since it has given all the scope that may be needed for division and debate. It has always been the key problem."

The number of committees that have looked into the issues relating to police powers over the years have been too numerous to mention. However, in order to exemplify the size of the task, it is worth noting two examples.

The Philips Royal Commission into Criminal Procedure in the United Kingdom was set up in February 1978. The Committee consisted of fifteen members who took until January 1981 to present their report. There was extensive debate in Parliament and in public over the recommendations of the Committee and legislation was not passed until 1984.

The Consultative Committee on Police Powers of Investigation in Victoria (hereinafter referred to as the Coldrey Committee) was set up in 1985. The Committee consisted of nine members. They first reported in April 1986 on "Custody and Investigation". They have since reported on "Fingerprints and Identification Procedures" (1987), "Body Samples and Examinations" (1989) and have produced a discussion paper on the "Power to Demand Name and Address" (?1988). The Committee has yet to report on a number of other areas including search and seizure.

The issues paper is the first step in the comprehensive review of police powers of investigation. It is simply impossible to cover all the areas in a paper of this nature and this paper has selected the following areas for coverage:

Consolidation of Police Powers

Power to Demand Name and Address

Move-On Power

Voluntary Attendance

The Power of Arrest

Post-Arrest Power of Detention

Search of Persons, Vehicles and Taking of Samples

Identification Procedures

Search Warrants

Electronic Surveillance

Other Investigative Techniques

The Need for a Comprehensive Review

CONSOLIDATION OF POLICE POWERS

The Queensland Police Service is the primary law enforcement agency for the State of Queensland. As such it is empowered by statute with the enforcement of over sixty Acts of the Queensland Parliament.

Unfortunately, Queensland legislative history is such that when each Bill was drafted it contained policing powers independent of the next. It may be that initially such a procedure was considered efficient in ensuring that the most effective means of law enforcement was provided for each issue addressed. Indeed, there is little doubt that such a policy will, in the short term, be effective. However, it will remain effective only so long as there are a minimal number of Acts which require police attention.

As may be expected, in the one hundred and thirty-two years of the Queensland Parliament the number of Acts which have conferred powers upon police have been anything but minimal. The obvious consequences of adopting a legislative policy which zealously caters for the independent enforcement needs of each Department of the Government are numerous:

- An anomaly exists where the powers conferred for the enforcement of a relatively less important Act far exceed those available for an Act which by its design deals with the protection of human life and apprehension of violent offenders.

- Civil rights which may be safeguarded in one Act are neglected in another. The obvious illustration is the strict requirements imposed in order to conduct a search under the Domestic Violence (Family Protection) Act 1989 as opposed to those under section 24 of the Vagrants, Gaming and Other Offences Act 1931.

- A police officer cannot reasonably be expected to have at call of memory the vast number of powers and individual requirements contained in the various Acts. Consequently, needless mistakes are made which are often misinterpreted as an abuse of power.

- It is impossible for the general public to understand what the police are or are not empowered to do.

Many jurisdictions throughout the Commonwealth have recognised the problems which emanate from a series of unrelated Acts each containing independent policing authorities. Various Australian committees and commissions have been established to examine the need for the consolidation of police authorities under the umbrella of one Act.

As early as 1979, the Honourable Justice Kirby, Chairman, Australian Law Reform Commission addressed the issue of the consolidation of police authorities in a paper presented to the 20th Australian Legal Convention:

> "[As] . . . a focus for our own clear thinking and for articulating the modern balance which our society is prepared to strike between its need for effective law enforcement and the protection of individual rights, we should endeavour to collect the principal rights and duties of citizens and police in a comprehensive statute. No longer should this area of the law be the province only of the expert. This is one area where knowledge of . . . [civil] . . . rights is vital."

Since then the general trend reflected in the recommendations of subsequent committees has been a marked preference towards the inclusion of police authorities in one Act.

An argument against consolidation is that it makes all matters of equal weight, thus enabling police to use wide-ranging powers in respect of minor offences. For this reason, it is argued, separate Acts authorise specific powers for specific purposes.

While it is recognised that different circumstances should result in more or less intrusive powers being available to police, consideration might be given to creating categories of offences for which specific powers may be available.

There is little doubt that the current situation is complicated. The issue therefore is to what extent, if any, the multitude of police powers should be consolidated into one Act. How can this best be achieved so as to ensure that the powers available to the police adequately reflect the seriousness of the offence, in each individual case?

Some Issues for Consideration are:

- Should all police powers be provided in a single piece of legislation?
- What, if any, powers should be available to police in respect of all offences?
- What, if any, powers should be restricted to specific types of offences?

POWER TO DEMAND NAME AND ADDRESS

Any discussion of police powers must address the issue of the power of a police officer to require a person to reveal his/her name and address. Although in comparison to other police powers this is a relatively simple one, it is also a highly contentious one as it directly infringes the common law right to silence.

The Current Position in Queensland

The law in Queensland derives from two sources;

- the common law;
- various statutory provisions.

The Common Law

The position at common law is such that while a police officer is perfectly entitled to ask a person to divulge his/her name and address, the person is perfectly entitled to refuse to answer that question. Unless there is a specific provision of law requiring the person to answer, he/she does not have to. This common law right to silence extends not only to questions as to name and address, but to any questions asked by a police officer.

As Lord Parker C.J. said in *Rice v Connelly* [1966] 2 Q.B. 414:

> "it seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer the questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest."

Statutory Obligation to Provide Name and Address

There are a number of statutes which allow members of the Queensland Police Service to demand the name and address of people in certain circumstances. These exceptions to the common law position are found in a disparate range of over twenty statutes.[2]

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2 State Transport Act, s.71; Litter Act, s.3; Local Government (Chinatown Mall) Act, s.41; Native Plants Protection Act, s.7; Censorship of Films Act, s.39; Fisheries Act, s.18; Fraser Island Public Access Act, s.14; Health Act, s.168; Local Government (Queen Street Mall) Act, s.35; Queensland Marine Act s.18A; Queensland Marine (Sea Dumping) Act, s.24; Casino Control Act, s.114; Fauna Conservation Act, s.14; Liquor Act, s.132; Liquor Act, s.158A; Liquor Act, s.73; National Parks and Wildlife Act, s.15; Noise Abatement Act, s.39; Law Courts and State Buildings Protective Security Act, s.20; Racing and Betting Act, s.233; Stock Act, s.25; Animals Protection Act, s.15A; Drugs Misuse Act, s.22; Firearms and Offensive Weapons Act, s.85; Hawkers Act, s.36; Pawnbrokers Act, s.48; Police Dogs Act, s.10; Public Safety Preservation Act, s.12; Second Hand Dealers and Collectors Act, s.55; Vagrants, Gaming and Other Offences Act, s.31;

Generally the provisions require people to give their name and address when asked, in circumstances where they are found committing or are reasonably suspected of having committed particular offences specified in an Act, or where police are investigating an offence under the Act and suspect that the persons have information. This does not include other provisions that require persons to produce licences under different statutes.

There is no power under the Criminal Code for an officer to require the name and address of a person who is suspected of committing an offence under the Code - i.e. a more serious criminal offence. Thus, a person who is found or suspected of having committed an armed robbery, a rape, a murder or for that matter any offence under its provisions, cannot be compelled to provide his/her name and address. Particular difficulty is encountered in relation to offences for which there is no power to arrest without warrant. For example, a person reasonably believed to have obtained goods by false pretence (Criminal Code, s. 427)[3] can only be summonsed or arrested with a warrant. In order to obtain the summons or warrant the police require the name and address of the suspect yet have no power to demand it if the suspect does not co-operate.

Many of the provisions that do exist state that a person may be arrested without warrant for a failure to provide a name and address, or for providing a name and address which the police officer reasonably suspects is false.

The Lucas Committee

The Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (known as the Lucas Committee Report) addressed this issue as far back as 1977. The Committee looked at the power of the police in the circumstances where they come upon a person acting suspiciously. After a discussion of the concept of "suspicion", and the difficulties associated with describing what makes a person suspicious in different circumstances, the Committee (1977, p. 161) made the following comment:

> "The community pays a lot of money to have police going on patrols to look for suspicious behaviour. Having taken these steps, and paid these monies, it is a ridiculous state of affairs to deny them the legal tools to investigate the signs when they make their appearance."

The Committee were of the opinion that a power to demand name and address, whilst unnecessary in the case of decent law-abiding citizens who would provide their name and address if spoken to courteously, is designed to deal with

3 See also notes to s. 5 Carter's Criminal Law of Queensland

criminal offenders. They recommended that the police should be given the following powers subject to certain controls (Lucas Committee Report 1977, pp. 162-163):

1. If a police officer suspects on reasonable grounds that a person may have committed, or that he/she may have been about to or preparing to commit some indictable offence, whether in Queensland or elsewhere, he/she may call upon the suspect to give his/her name and address and confirm his/her identification and give an explanation of the conduct giving rise to the suspicion.

2. If the suspect fails to give this information or gives information that tends to confirm the suspicion, the police officer may require him/her to go to the nearest manned police station. At this stage the police officer should have the power to search the suspect and his/her possessions to satisfy himself/herself that the suspect is not in possession of a weapon that could be used against him/her. Ordinarily this would be in the nature of a "frisking" and would not be subject to the notice requirements recommended by the Committee for police searches (Lucas Committee Report 1977, p. 115).

3. Everything that takes place at the station must be subject to recording requirements and the police officer must state the circumstances under which the person became under suspicion and again request the person's particulars. Upon giving the required notice, the police should now have the power to make a more careful search of the suspect and his/her possessions in order to check for evidence of the commission of an offence.

4. If the suspect gives the particulars in a satisfactory form he/she is to be returned at once to the place where he/she was detained or taken to some other reasonable destination.

5. If the suspect again fails to give the particulars or gives particulars that the police officer regards as unsatisfactory, he/she then becomes liable to arrest as a suspected person.

6. Upon the trial of the person for such an offence if the court is satisfied that the actions of the police officer were necessary in the interests of the community in every respect, including the time he/she detained the suspect at the police station, and the defendant refuses or fails to give a satisfactory explanation (which explanation must be given in closed court upon his/her application) of non-involvement in any indictable offence then the defendant becomes liable to a penalty not exceeding $50.

Mr Fitzgerald Q.C. in his report (*Report of a Commission of Inquiry Pursuant to Orders in Council* 1989, p. 48, hereinafter referred to as the Fitzgerald Report 1989) outlined the fate of the Lucas Committee Report in the following terms:

> "In a cynical exercise of obfuscation and delay, the Government set up a Committee comprising Lewis, the then Solicitor-General, and the then Under Secretary, Department of Justice to review the Lucas Report. For practical purposes that was the end of the matter for over a decade . . . The Report . . .was largely ignored."

So despite the recommendations, the position in Queensland remains substantially the same as it was and the police still do not have a general power to demand names and addresses.

Position in Other Jurisdictions

Western Australia

Section 50 of the Police Act of Western Australia provides that a police officer may demand from any individual his/her name and address and may arrest without warrant any such person who refuses to give his/her name and address when required to do so, or who furnishes information which the officer has reasonable cause to believe to be false. If taken literally, the provision appears to be very broad, applying to any member of the community regardless of whether the police suspect them of being involved in an offence or of being a potential witness to an offence.

In the case of *Trobridge v Hardy*, (1955) 94 C.L.R. 147 Mr. Justice Fullagar was the only member of the High Court to discuss the limit of the power set out in section 50. He stated, at page 154:

> "the drastic power conferred by section 50 must, I would think, be taken to be conferred only for the purposes of the Act in which it occurs".

More recently in 1982 Wallace J. said that a police officer is not permitted to seek a person's name and address unless he/she suspects that the person has committed an offence or may be a witness to the commission of an offence (*Yarran v Czerkasow* [1982] WAR 239, 240)

South Australia

In South Australia a member of the Police Force is empowered to require a person to state his/her full name and address if the officer has reasonable cause to suspect:

(a) that a person has committed, is committing, or is about to commit an offence whether summary or indictable; or

(b) that a person maybe able to assist in the investigation of an offence or a suspected offence (Summary Offences Act 1953, s. 73a).

The section also provides that if the officer has reasonable cause to suspect that the name or address as stated is false, he/she may require the person making the statement to produce evidence of the correctness of the name or address. If the person refuses or fails without reasonable excuse to comply with the request for the name and address or verification, or if the person states a false name and address or produces false verification, the person shall be guilty of an offence. The Act also allows the person of whom the request has been made, to require the officer to state his/her surname and rank (Summary Offences Act 1953, s. 74a (2), (3) & (4)).

It should be noted that the provision in the South Australian legislation enables a member of the Police Force to require the name and address not only of a person suspected of being involved in an offence, but also of any potential witness to any offence. Furthermore, it is not a requirement of the provision that the police officer must lack knowledge of the person's name and address before the power can be exercised. The section does not provide any penalty for a failure by the police officer to disclose his/her surname and rank to the person.

Tasmania

The provision in Tasmania differs somewhat from that in South Australia. A member of the Police Force is only empowered to require a person to state his/her name and address where the police officer becomes aware that, or has reasonable grounds for believing that, a person has committed or is committing an offence against the Police Offences Act 1935 (Police Offences Act 1935, s. 55A). Note that this provision does not extend to the situation where an officer suspects an offence is about to be committed. Furthermore it does not apply to offences under the Tasmanian Criminal Code.

Whilst the Tasmanian legislation makes it an offence to fail or refuse to comply with the request, or to state a name or address that is false, it does not provide for verification of the name and address. Again, it does not limit the police officer's powers in situations where he/she lacks knowledge of the person's name and address and it makes no provision for the police officer to provide his/her name to the suspect. The provision applies only to persons suspected of committing or having committed an offence and does not apply to witnesses.

Northern Territory

Section 134 of the Police Administration Act of the Northern Territory is more detailed. Firstly, it only allows a police officer to require the name and address of a person whose name and address is unknown to the officer. Secondly, it can only be exercised if the police officer believes on reasonable grounds that the person may be able to assist him/her in his/her enquires in connection with an offence which has been, may have been or may be committed. Thirdly, it

requires the police officer to inform the person of the reason for the request and if the person refuses or fails to comply with the request, or gives information which is false, it shall be an offence.

The section also provides that a police officer who makes a request of the person, if requested by that person to give his/her name or address of his/her place of duty, shall not refuse to do so. A penalty for such refusal is provided in the Act.

This section applies not only to suspects but also to witnesses.

Victoria

Whilst Victorian police do not have a general power to demand the name and address of a person, certain statutes confer such a power on a police officer in certain circumstances.[4]

It appears that these powers are limited to situations in which the police officer has reasonable grounds to believe that a particular offence specified in the Act has been committed or where a police officer has the power to demand the production of a licence from a licence holder.

The Consultative Committee on Police Powers of Investigation (hereinafter referred to as the Coldrey Committee ?1988) is unaware of any statutory provision requiring a person who is merely a witness to identify himself/herself or give his/her address.

New South Wales

There is no general power in New South Wales for a police officer to demand name and address of suspects or of persons found committing offences or of witnesses. However, there are a number of legislative provisions conferring limited powers of questioning in specific circumstances and for particular purposes. One of these is the Motor Traffic Act 1909, section 5, by which the driver of a motor vehicle is obliged to disclose his/her name and address to a police officer who makes such a request.

The New South Wales Law Reform Commission in its discussion paper on Police Powers of Arrest and Detention tentatively proposed the reform of the law in relation to the Power to Demand Name and Address. The proposal was that a police officer could exercise a power to demand name and address where -

(a) the person's identity is unknown to the police officer; and

(b) the officer reasonably believes that the person may be able to assist in enquiries in relation to a criminal offence.

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4 For example Court Security Act 1980(section 3); Firearms Act 1958 (s.27); Liquor Control Act 1968 (s.119) and Road Safety Act 1986 (s.59).

The provisions should apply to persons suspected of offences and to witnesses. The police officer should specify the reason why the information is sought and there should be a right for the person to demand and receive from the police officer the name, rank and station of the officer.

The discussion paper suggested that it should be an offence for the person to refuse a lawful and reasonable request to give his/her name and address or to give a false name and address however it made no comment as to the situation if the police officer refused to disclose his/her name, rank or station (New South Wales Law Reform Commission Discussion Paper 1987, p. 90, hereinafter referred to as the N.S.W. L.R.C. D.P. 1987).

England

The approach taken in the United Kingdom is slightly different although it is of similar practical effect as a power to demand name and address.

Section 25 of the Police and Criminal Evidence Act 1984 provides for a limited power of arrest in respect of all offences other than "arrestable offences". The power can be exercised if a constable has reasonable grounds for suspecting that any offence has been committed or attempted, or is being committed or attempted, and it appears to him/her that service of a summons is impracticable or inappropriate because "any of the general arrest conditions is satisfied".

The general arrest conditions include where the officer does not know and cannot readily ascertain the name and address of the suspect or where he/she reasonably believes that the name or address given is false.

Although it is a general arrest provision, in effect section 25 enables a police officer to arrest a person for failure to provide a name and address if he/she suspects the person's involvement in an offence.

Scotland

By far the widest power conferred on a police officer is that conferred by section 1 of the Criminal Justice (Scotland) Act of 1980. It provides that a police officer who has reasonable grounds for suspecting that a person has committed or is committing an offence may require that person to give not only his/her name and address but an explanation of the circumstances which have given rise to the officer's suspicion. The officer is also empowered to require the name and address of any other person who the officer believes has information relating to the offence and whom the officer finds at the place where the offence is suspected to have been committed or at any other place where the officer has the right to be.

The officer is also entitled to require the suspect and/or the witness to remain with him/her while he/she verifies any name and address given provided it is done without delay, and while he/she takes any notes of explanations given by the person. The officer is entitled to use reasonable force to ensure that the person does remain with the officer.

The officer is required to inform the person of the general nature of the offence which he/she suspects has been or is being committed and, in the case of a witness, of the reason for the requirement that he/she believes the person has information relating to the offence. A failure to do so may constitute an offence.

It is an offence for a person suspected of having committed or committing an offence to fail to provide a name and address and it is an offence for the witness to fail to provide a name and address upon request, however the penalty for the witness is somewhat less than that for the suspect.

There is no provision in the section requiring the police officer to furnish the suspect or witness with his/her name rank or station.

The Need for a General Power

The Victorian police have, since 1981, prepared various submissions to the government seeking the power to demand names and addresses. In the final submission formulated in March 1988 the Victorian police suggested that the power to request the name and address would achieve the objective of increased efficiency and effectiveness of police activities by providing more certain means of:

(1) identification of persons in respect of whom there is a suspicion of involvement in an offence but:

- there is insufficient material available to justify an arrest;
- the offence is non-indictable and the person has not been found committing the offence within the meaning of section 462 of the Crimes Act (Vic.);

so that

- follow up investigations can occur as circumstances permit or as more information is available;
- procedure by way of summons can be facilitated where appropriate.

(2) identification of persons who are suspected of being about to commit an offence so that:

- the person, if in fact about to commit the offence, would be deterred from so doing;

- if the offence thought about to occur, does occur, police have an immediate lead to follow.

(3) identification of persons who could be reasonably thought to have observed/heard a serious offence or events associated with it and thus be able to assist police with their investigations (Coldrey Committee ?1988, p. 2).

If it is considered that the power to request the name and address of a suspect and/or a witness will assist the police in achieving the objective of crime prevention and reduction, consideration must also be given as to what safeguards ought to be imposed in order to protect the rights of the citizen and to minimize the invasion of privacy.

It appears that the arguments in support of the granting of such a power rely on its usefulness in two spheres in order to justify the grant - the investigation of crime and the prevention of crime.

There appears to be little doubt that the lack of the power to demand the name and address of a person hampers the police in their investigation of crimes or suspected crimes. Some have taken the view that the power should be granted despite the fact that it infringes civil liberties whilst others can see no justification for the granting of such a power at the expense of individual's rights.

The Australian Law Reform Commission (1975, p. 34, hereinafter referred to as the A.L.R.C. 1975) considered it appropriate that the police have a power to demand the name and address where the police, knowing that a crime had been committed and seeking to discover the author of it, wish to interview all those who may be in the vicinity at the time. They considered that taking the names and addresses for subsequent follow up by the police was a far more satisfactory way of coping with the situation than seeking to detain what may possibly be a large number of people at the scene of the crime. The Thomson Committee (1975, p. 26)also recognised the need for such a power in similar circumstances. Similarly the Norris Committee endorsed the recommendations of the Australian Law Reform Commission in this respect.

The second situation in which the Australian Law Reform Commission felt that the police needed a power to demand name and address is where the police do not know that an offence has been committed but think that it may have been, and wish to interview all those who may have been witnesses to it. The example cited is the traffic accident situation where a witness may often be reluctant to co-operate due to the potential for inconvenience involved in attending court hearings etc. It is suggested that in these circumstances such witnesses may not be willing to give their name and addresses however may do so if required by the police. It should be noted that these recommendations do not include any power for the police to question a person further than that.

It is argued that in both these situations where a crime has been committed, or might have been committed, it is important that the police be able to identify a suspect. If there is a suspect whose name and address is unknown to the police, and there is insufficient evidence upon which to arrest that person there and then the police are hampered in their investigations as the suspect may never be located again.

The Australian Law Reform Commission outlined a third situation in which it considered that the granting of power to demand name and address would be appropriate. Such a situation is one where the police suspect that an offence is about to be committed. For example, if a person is found loitering in a dark alleyway at night time in circumstances which arguably cause some suspicion to arise in the mind of a police officer, it is argued that the use of a power in this context may result in one of two outcomes. The first is that if the police have the name and address of the person then, in the event of a subsequent offence being committed, the police will have a starting point for their investigation. The second outcome proposed is that if the police have a power to demand the name and address of the person suspected, it may deter the person from carrying out an offence, thus preventing crime.

Whilst the Australian Law Reform Commission report has suggested some situations in which the power might be useful, arguments have also been raised to the contrary.

One of the primary arguments against the granting of a power to demand the name and address of a witness concerns the effectiveness of such a power. Where there is no power to compel a person to answer any further questions or to provide a statement or in fact to remember and describe the events which the police are seeking to investigate, the usefulness of the name and address of such witness is limited. Certainly where a person has provided information to police in relation to an offence or a suspected offence, it may be important that the police have identifying information in relation to the informant. However, in the example given of a number of people who are present at the scene of a crime, if those people are unwilling to co-operate with the police it is unlikely that giving the police a power to demand their names and addresses will achieve any purpose.

There is some basis for the argument that whilst some persons may be initially unco-operative, they may have second thoughts. If the police have their name and address they can be contacted at a later date when they may be more willing to provide further information. Whilst this is recognised, the question raised is whether the possibility of such a change of heart is sufficient reason for the granting of the power.

Another of the arguments against the granting of such a power is concerned with potential for misuse. This power, if abused, has the capacity to harass certain groups such as Aborigines and young people. Furthermore, it is argued that it could be used for holding charges, enabling police to investigate other crimes. If such a power is to be given to the police, adequate protection needs to be provided to the public against the potential abuses outlined above.

An argument in favour of the power with respect to suspects, is that it may encourage police to use a summons procedure[5] rather than arrest. There is no doubt that an increase in the use of a summons as an alternative to arrest would be welcomed, but the question needs to be posed - will an increase in police power achieve this purpose? If a suspect were confronted by the police and the police officer then requested the suspect's name and address, informing the suspect that if he/she did not provide the details the officer will have no alternative but to arrest him/her, it is likely that the suspect would provide those details. Thus, it is argued, there is no need for the police to have the additional coercive power to demand name and address.

Furthermore, the argument is based on the presumption that the police will be prepared to use the summons procedure as the alternative to an arrest. In relation to indictable offences, it may not be realistic to expect that a summons will be used. In relation to such offences, quite often the police will wish for an interview with the suspect and if the suspect refuses to be interviewed it is likely that the police will arrest him/her if they have sufficient evidence upon which to base the arrest. If the suspect agrees to an interview then it is likely that, without a coercive power of name and address, the suspect will divulge his/her name and address to the police in the course of the voluntary interview.

A further aspect of this vexing question is that of verification of name and address. If one accepts as realistic the scenario where the police officer confronts the suspect with a choice of giving the name and address and being proceeded with by way of summons or the choice of arrest, it is likely that the suspect will choose the former of the two procedures. The question then arises as to what the police officer can do if he/she suspects the person is not giving him/her the correct name and address, when the police have no power to require verification. Again however, it can be argued that the police have the choice of arresting the person if they suspect that the procedure by way of summons may not be appropriate and, faced with that alternative, the suspect may well choose voluntarily to provide verification of identification to the police officer.

A more difficult situation is the one where the police officer suspects a person of having committed an indictable offence but has insufficient evidence at the time to justify an arrest of that person. If the police officer had the power to demand the name and address of the person and to require verification, the police would have a lead to follow if they were able to gain some further evidence at a later date. This argument however must be viewed in the light of the power of arrest granted to police. It becomes a question of degree as to what level of suspicion is sufficient to justify an intrusion by the police into the freedom of the individual.

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5 It is open to police to proceed by way of summons rather by arrest. This involves the police officer laying an information before a Justice of the Peace who may then issue a summons for the appearance of the alleged offender. The summons directs the person to attend before the court in relation to the alleged offence. The document is served upon the suspect by the police officer.

Some Issues for Consideration are:

- If a police officer has a suspicion, but insufficient evidence for an arrest, should the power be available to demand the name and address of the suspect and evidence of the correctness thereof?

- If so, what degree of suspicion should be required?

- Should any such power be a general power, available in respect of all suspected offences?

- Should a similar power be available with respect to potential witnesses?

- If so, should the police officer be obliged to provide the suspect/witness with the officer's name, rank and station?

- Should the police officer be obliged to provide reasons for the demand?

- What should be the consequences of a failure to comply for the suspect/witness and for the police officer?

- What, if anything, should the police be able to do in respect of a person who is suspected of having committed an offence but who is not liable to arrest? e.g. detain for questioning, demand name and address?

MOVE-ON POWER

It has often been argued by police officers throughout the country that there are insufficient powers available to them for dealing with persons whom they suspect are likely to commit a breach of the peace or an offence, but have done neither.

A police officer has a duty to preserve the peace and prevent an offence occurring. However, it is difficult for an officer to make a judgement as to when a fractious person becomes a "likely offender" such as to justify the exercise of a power.

One of the suggested methods of dealing with the problem is the introduction of a move-on power. The details of such a power have been varied but the essential feature is a power to require persons in a public place *who may not have committed an offence* to leave that public place. The usefulness of such a power is seen to be its preventative aspect - allowing the police to take action to prevent the occurrence of an offence or of unacceptable behaviour that would not constitute an offence.

Situation in the Australian Capital Territory

Move-on power was proposed in the Australian Capital Territory in June 1989, when Mr. Stefaniak, M.L.A. presented a private members Bill which would give members of the police force the power to "move-on" persons in a public place if the police officer believed on reasonable grounds that:

(a) an offence against a law of the Territory has been, or is likely to be, committed in the vicinity by that person or by another person;

(b) the movement of pedestrians or traffic is being, or is likely to be, obstructed by the presence in the vicinity of that person or of another person; or

(c) the safety of that person, or of another person in the vicinity, is in jeopardy.

The penalty for contravening the direction was to be $1000 or 3 months imprisonment.

Much debate occurred in the community over the need for any general loitering powers when there already existed specific legislation concerning street offences. At the time of introduction of the Bill, Mr. Stefaniak said:

> "The whole idea of a move-on power is to stop crime before it happens. The whole idea is to nip crime or a potentially dangerous situation in the bud. Acceptance of this Bill will lower the amount of street crime: it will therefore decrease the number of persons charged with more substantive offences and appearing before the courts."

One of the groups who specifically supported the introduction of such a power was shopkeepers and it was argued that police should be able to respond to the complaints of shopkeepers who did not wish to see students or members of disadvantaged groups in front of their shops. They were not doing anything unlawful but were "bad for business".

Those who argued against the introduction of such a power questioned the ability of the police officer to see into the future:

> "Clearly police have very little training in the law; very limited training in sociology; they have no training in predicting future events. Futurology is in itself an inexact science. It is based on an understanding of probabilities.
>
> Police are not trained to cope with such situations. Nobody is trained to respond at this sort of level to people with whom they have not been in close contact. Psychiatrists, social workers, psychologists can only guess what people whom they are seeing and whose files they have read are likely to do. They would not pretend to be able to predict whether someone they've just met will commit an offence." (Tomlinson 1989, p. 18).

Another argument against the power was that it was to be exercised over persons whose behaviour was not otherwise unlawful. The police do not need move-on powers to protect the community from illegal behaviour because they have the powers conferred in the statutes dealing with street offences. Why then should they have a power to deal with people who are not committing offences?

The government at the time was opposed to the power as being too broad an approach to a specific problem - "the power proposed is a broad one granting to the police, in lieu of the legislature, the right to determine standards of acceptable behaviour in public places." (Australian Capital Territory Office of the Chief Minister 1989, p. 4).

Another of the concerns raised in the debate was that the power would be used most often against the unemployed, the homeless and low-income earners including youth - all of whom make the most use of public space and civic amenities. Public transport systems in most cities have been constructed around shopping centres and therefore young people, especially school students, gravitate towards the shopping centres. The range of reasons that people congregate in public places is wide but illegal or unacceptable behaviour is not a necessary consequence.

The Legislative Assembly set up a Select Committee to report on the proposed Bill and received submissions from the public. They recommended that the Bill be amended. It was re-drafted so that the power to move-on as ultimately enacted only related to persons believed to be likely to engage in crimes of violence, intimidation of the person, fighting in a public place or damage to property (Police Offences Act 1930, s. 35).

The Committee recognised that there were many members of the community who were concerned about the public behaviour of some sectors of the community. However, they saw the need for the underlying causes to be addressed rather than simply granting police more power.

Situation in South Australia

South Australia has had a move-on power since 1972. Section 18(2) is perhaps the most controversial provision of the Summary Offences Act 1953 (S.A.), allowing the police to demand that people move from a public area, even if those people are acting quite lawfully and properly.

In the High Court judgement of *Samuels v Stokes* (1973) 130 C.L.R. 490 Gibbs J. (as he then was) said of the section:

> "In my opinion the context of Section 18(2) makes it clear that a person may be loitering although he is standing about with a perfectly lawful purpose. The words of the section make it clear that a person may be requested to leave the area notwithstanding that he is lawfully there and that there is no suggestion that he has done or will do anything wrong."

The Criminal Law and Penal Methods Reform Committee (1974, p. 12) described the provisions as "at best a subterfuge and at worst an unwarranted interference with the liberty of all persons to use the streets and other public places" and recommended the abolition of the provision in 1974.

At present the South Australian provision still exists.

Some Issues for Consideration are:

Should Queensland police have a move-on power?

Should they have some other power to deal with problems in places such as the Queen Street Mall?

What behaviour in public is unacceptable?

Should all unacceptable behaviour constitute an offence?

If not, what should be the appropriate way to deal with it?

If so, does the law currently proscribe all unacceptable behaviour?

VOLUNTARY ATTENDANCE

Current Position in Queensland

One of the difficulties that often arises in practice is whether a person is "under arrest" or is simply "assisting the police with their enquiries". The latter situation has been regarded by the police and often by the courts as a "voluntary attendance" by the person, despite the fact that the person may have felt that he/she had no choice but to attend at the request of the police officer. There is no obligation on the police officer to inform the person that he/she is not obliged to comply with a request to attend at the station.

The practical implications of this situation are that the volunteer is not accorded the same rights and protections accorded a person in custody. If arrested, the police are obliged to inform the arrestee of the charges against him/her, to caution him/her of the right to remain silent, and are constrained by the Judges' Rules concerning questioning of persons in custody.

In contrast, the law provides that the police have relative freedom to investigate as long as they have the "voluntary co-operation" of the person and none of the above safeguards apply.

The Australian Law Reform Commission (1975, para. 65) recognised the problem and said that the "concept of 'voluntary co-operation' would appear to be very much stretched in Australian police practice". The New South Wales Law Reform Commission Report (1990, p. 67) also recognised the problem, describing the situation as "quite unsatisfactory, as it provides a judicially authorised loophole by which the police may avoid the law of arrest and related procedural requirements". Both of these Commissions pointed out in their reports that if a statutory regime was proposed which provided for a fixed period of time during which the police could lawfully detain a person for questioning, such a regime could be totally undermined by a police strategy based upon avoiding arrest wherever possible and relying instead on the consent of suspects (New South Wales Law Reform Commission Report 1990, p. 67, hereinafter referred to as the N.S.W. L.R.C. R. 1990; A.L.R.C. 1975, p. 28). This appears to have been the result in Scotland after the introduction of the Criminal Justice (Scotland) Act 1980 which empowered police to detain a person for up to six hours:

> "A Scottish Office study found that many officers were continuing to rely on voluntary attendance rather than using statutory powers of detention. One third (and in one area, over half) of suspects attending stations were volunteers in 1981-1984." (Dixon, Coleman & Bottomley 1990)

One of the contributing factors to this high number was the fact that in the parliamentary debates which surrounded the new legislation, the police were led to believe that the new detention procedure was to supplement the old system which was heavily reliant on consent, rather than to replace it. The New South

Wales Law Reform Commission (1990, p. 67) saw the lesson to be learned from the Scottish experience as emphasising the need to address the issue of voluntary attendance directly and fully in any new legislation.

The Power to Detain a Person Without Arrest

The Scottish Approach

The Scottish approach to the problem has been a controversial one. Section 2 of the Criminal Justice (Scotland) Act 1980 provides the Scottish police with a detention power short of arrest and charge. Under the Act, where a constable has reasonable grounds for suspecting that an offence has been committed which is punishable by imprisonment, the constable may detain the suspect whilst investigations into the offence are conducted.

Such a provision was recommended by the Thomson Committee on Criminal Procedure in Scotland in an effort to regularise the police practice of inviting a suspect to attend voluntarily at a police station.

The four main considerations which appeared to have influenced the Committee when making this recommendation for a form of limited or temporary arrest called "detention" are explained in a Scottish report into the use of the power:

> "First, the Report seems to suggest that the necessary equilibrium between individual rights and freedoms and the public interest had got out of balance. It argues that any solution to the problem must involve some compromise between these two interests. On the one hand the police must have sufficient powers to enable them to carry out their legitimate duties of crime detection but, on the other, the individual must be safeguarded from unreasonable police interference. Yet, if too much emphasis is given to safeguarding individual rights then this may lead to a position 'in which criminals can render the investigation of their crimes difficult or even impossible merely by standing on their rights' (2.03). The suggestion seemed to be, then, that the inability of the police to detain legally a suspect short of actual charge and arrest made the investigation of crime difficult. Further, the Report notes that 'as people become increasingly aware of their rights the present tacit co-operation which makes it possible for the police to function may not continue'.(3.11)
>
> A second reason for Thomson's recommendation of a power of detention was to legitimate 'those police practices which are accepted as fair by the public including criminals although they may be technically illegal or at least of doubtful legality' (2.03). The Committee believed that the police were able to carry out their functions only because some persons who were detained without warrant failed, either through ignorance or fear of authority, to exercise their rights. Consequently, it had to be decided whether such practices as detaining and questioning should be formally prohibited or legalised with suitable safeguards. This point was later put far more bluntly by a former Solicitor General, Lord McCluskey, in Parliament. The police, he said, could either release a suspect who refused to co-operate or they could arrest him 'on what may well prove to be inadequate evidence, a bad charge; or they can detain him against his will either on some technical charge or by means of some vague and imprecise threat.' (15 January, 1980). He took the

view that this practice was commonplace with the courts turning a blind eye to ensure that criminal activity was properly investigated. Thus, in seeking to legitimate existing police practices, Thomson's recommendations sought protection against being sued for false imprisonment.

A third and related consideration in recommending a power of detention was that it would not only help to legitimate and control existing police practices, but it would also, at the same time, assist in defining the obligations and duties of the citizen. Hence the Report comments 'We firmly believe that if the powers and duties of police are clearly defined the rights and obligations of the public will also become clearly understood, with consequent improvement in relations between police and public' (2.03).

The fourth reason for favouring a power of detention was to clear up the confusion and uncertainty which surrounded the issue of the legal status of evidence obtained from suspects during police questioning. This uncertainty arose because there was *both* a lack of clarity over the distinction between a formal arrest, which would be accompanied by a charge, and a technical arrest in which the suspect, although not charged, was free to go about his daily business and, as noted earlier, there was confusion in case law over the admissibility of statements made by suspects prior to charge in answer to police questions. In the attempt to clear up the problem the Thomson Committee recommended that the evidence obtained from suspects prior to arrest and charge should be admissible as evidence so long as it was fairly obtained, under formal caution, and tape-recorded (7.13)." (Scottish Office Social Research Study 1986, pp. 4-5).

There was much public debate over the Committee's proposals. On the one hand was argued the need to regularise the police practices so that the police would be aware of their powers and the public aware of their rights.

On the other hand concern was expressed that just because the police felt it necessary to take certain actions this was sufficient justification to legalise those actions - this was considered a serious erosion of civil liberties (Scottish Office Social Research Study 1986, p. 6). The editorial comment in "The Scotsman" supported this view in its leader on 20 December, 1979:

"The Bill, it is said, merely legalises practices to which the police sometimes resort. If the police can bend the rules and take advantage of the suspects who are amenable to persuasion or ignorant of their rights, that does not make the practice one to be condoned. It is poor argument to suggest that an irregular practice is a sound basis for a constitutional change which flies in the face of the presumption that suspects or accused should always be given the benefit of the doubt." (Scottish Office Social Research Study 1986, p. 7).

"The Guardian" took a different approach saying:

"The issue which needs to be resolved is whether the police have the right to detain someone suspected of an ordinary criminal offence for up to six hours for questioning. The answer to that is: yes - so long as there are adequate safeguards. The present law tips the scales too much in favour of the offender." (Scottish Office Social Research Study 1986, p. 7).

Despite the heated debate, the provisions were introduced and the detention powers took effect from 1 June, 1981.

Five years later a Scottish Office Social Research Study into the effectiveness of the provisions said that :

> ". . . It has been notable by its absence from the headlines. It has caused no major surprises or upsets in court and there have been no stories of Section 2 reducing detection rates or coming between the public and the police, or of voluntary attendance infringing suspect's civil rights." (Scottish Office Social Research Study 1986, p. 77).[6]

Earlier Debate in Queensland

In 1977 the Lucas Committee recommended that a limited power of detention, subject to safeguards, be introduced into Queensland, in order to "bring the law into line with police practice" (Lucas Committee Report 1977, pp. 139-140). They recommended that:

- the power only be exercisable by a police officer of the rank of Sergeant 2/C or above who reasonably suspects that the person detained is implicated in the commission of an offence to which the power applies;
- the power only apply to crimes as defined in the Criminal Code, and to offences under s.130 of the Health Act;[7]
- the detention is to take place at a police station and is to be for a period of two hours in the first instance, with a further four hours extension upon the authority of a commissioned officer and a further six hours upon the authority of a stipendiary magistrate;
- the interrogation is to be recorded on video or audio tape;
- the person detained should have the right to get in touch with a solicitor or other person of his/her choice and have that person present during questioning;
- the person should be informed of his/her rights and, if possible, his/her written acknowledgement should be obtained;
- a detailed register should be kept of all persons detained;
- no person may be detained more than once in respect of the same offence;
- the failure to observe these safeguards should render the evidence inadmissible.

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6 For a discussion of whether the provisions have achieved the four aims which the Thomson Committee had in mind see pp. 77- 82.

7 Offences previously contained in Section 130 of the Health Act are now contained in the Drugs Misuse Act 1986.

The Public Defender at the time argued against the power on the grounds that:

- the extent to which the law was being broken by police compelling people to go to the police station was not really known therefore it was not possible to say whether any change was required;

- there had been little or no public debate on the matter;

- once a power of this kind was granted it would be abused (Lucas Committee Report 1977, pp. 138-139).

The Committee rejected those arguments and recommended the power, however the recommendations have never been implemented.

Sir Harry Gibbs, in his address at the opening of the 2nd International Criminal Law Conference, Surfers Paradise on 19 June 1988 said:

> "I venture to think that no reform of the criminal law would be more important in practice than that which would satisfactorily define the powers of the police to question and search, the rights of the suspect during police questioning and the consequences of a failure to answer questions."

At the conclusion of the Criminal Law Conference, the Honourable Dame Roma Mitchell expanded upon the concept raised by Sir Harry Gibbs when she said:

> ". . . the argument that a person, who does not leave an interview room at police headquarters or demand to be allowed to leave, is consenting to remain seems . . . to be specious, and we believe that the police should not be required to rely upon such an argument to support the detention of the person for questioning. The police should not be forced into a position of reliance upon subterfuge or deceit in order to ensure the presence of persons whom they reasonably wish to interview concerning a suspected crime."

An Alternative Approach

The problem has been addressed in Victoria, a state which has introduced powers of detention for questioning after arrest and the associated safeguards,[8] through the expansion of the definition of "custody" to cover what may otherwise be considered voluntary attendance. The new definition of "custody" includes:

- those persons under lawful arrest by warrant;

- those persons lawfully arrested under the relevant provisions enabling arrest without warrant;

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8 See following section on Post Arrest Power of Detention for an explanation of the safeguards.

- those persons liable to arrest - i.e who have attended voluntarily and there is sufficient evidence in the possession of the investigating officer to justify arrest.[9]

Those safeguards that are to apply to a person "in custody" will therefore also apply to many "voluntary" attendees.

The New South Wales Law Reform Commission (1990, p. 31) recommended that the definition be extended even further so that a person is in custody if he/she is:

> "In a Police Station, Police Vehicle or Police Establishment in the company of a police officer, or is otherwise under police control, and is - (i) being questioned; or (ii) to be questioned; or (iii) otherwise being investigated - to determine his or her involvement (if any) in the commission of an offence."

The above solutions attempt to overcome the problem by ensuring that the safeguards are applicable to those "in custody" and to those who have attended "voluntarily".

The Right to Refuse to Accompany Police or to Leave the Station

The New South Wales Law Reform Commission (1990, p. 31) also recommended that where a person voluntarily attends at a police station or any other place for the purpose of assisting with an investigation, that person shall be informed at the beginning that he/she is entitled to leave at will unless placed under arrest. If a decision is taken at any time by a police officer to prevent the person from leaving, the person shall be informed at once that he/she is under arrest.

It has been argued that the proposal that a person in the voluntary company of a police officer be informed immediately his/her status changes to that of one who would be arrested if he/she attempted to leave, has the potential to promote constant legal argument as the four hour detention period commences from the time the status changes.

The then Chief Superintendent K. Drew, of the New South Wales Police Department said in response to the Commission's Discussion Paper on "Police Powers of Arrest and Detention" (1987):

> "It appears from the proposal that the court will be required to look at the relationship between the police officer and the volunteer and determine when the status of the person changed, in the mind of the police officer, and thereby activated the detention clock. If legislation similar to that proposed is enacted, it will most certainly form the basis of defence arguments as to when the status of the person changed. Such arguments will be designed to have evidence declared inadmissible. Take for example the following scenario:
>
> > Police commence to speak to a volunteer at a Police Station at 1 p.m. and do not suspect that the person has committed an offence until 2.30 p.m. At that time, he is informed that he is suspected of committing an offence and will be arrested if he

9 See for example section 464 of the Crimes Act 1958, Victoria.

attempts to leave (under the proposal the detention clock would be activated at this time).

The police officer now believes the four hour period will commence from 2.30 p.m. At 5.45 p.m. the suspected person signs a confession and hands police a weapon used in connection with the offence. *Prima facie* it would appear that the evidence is admissible.

However, if defence counsel can successfully argue that in reality the status of the person changed to that of a suspect who would be arrested if he attempted to leave, at 1.30 p.m., then the evidence obtained at 5.45 p.m. would arguably be inadmissible.

This fine distinction will at times be difficult to determine, both at the time and in subsequent court proceedings. The proposal, especially when coupled with the application of the envisaged exclusionary rule, will be too restrictive to police investigations and should be rejected." (Drew 1989, pp. 46 & 49).

The Royal Commission on Criminal Procedure in England recommended that a provision be included in the statute they were proposing, so that the fact that a person who is not under arrest is free to leave the police station be made clear to the person. An attempt was made to do this in section 29 of the Police and Criminal Evidence Act 1984 (England) which specifies that where a person attends voluntarily at a police station or anywhere else "for the purpose of assisting with an investigation", "he shall be entitled to leave at will unless he is placed under arrest" and "he shall be informed at once that he is under arrest if a decision is taken by a constable to prevent him from leaving at will" (Zander 1990, p. 66). This is less strict than the New South Wales Law Reform Commission proposal in that it does not require the constable to inform the suspect that he/she is not obliged to attend at the police station unless he/she is arrested. Thus, in practice, the suspect will often wrongly assume that he/she is under arrest or that he/she is not free to leave, and will not take advantage of his/her right to leave.

The House of Lords considered this point directly in relation to the proposed section 29 and an amendment was proposed to the effect that a suspect should be informed both orally and in writing at the time of his/her arrival that he/she was free to leave at any time. Lord Denning supported the proposal and said that if an interview was conducted wholly voluntarily, it should be conducted at a person's home:

"But to say to him, 'Are you willing to come along to the Police Station?' or 'Will you come along to the Police Station?' is half way to making an arrest. When he has got to the Police Station, the ordinary person can half feel he is under arrest, even though the police are said to be making inquiries. Then is the time to make clear to him that he is there voluntarily and that he can leave at that moment if he likes. This virtually means in many cases that he is under suspicion. In those circumstances he ought to be told, 'Well you can have a solicitor, if you like; you need not say anything' and so forth. In other words, give him all the protection which should surround a man who is under suspicion, because that is why he is there. A clause like that . . . will ensure the protection of the individual." (House of Lords, *Hansard* July 5 1984, Col. 502).

The Home Office Minister did not agree with the proposed amendments claiming that the administrative burden on the police would be too great. Ultimately, the proposed amendment was defeated.

At least one English commentator has suggested a solution similar to that proposed by the New South Wales Law Reform Commission - that a suspect who is asked whether he/she would mind coming down to the station to answer a few questions should be warned that this does not mean that he/she is under arrest and that he/she is free to come and go as he/she pleases (Zander 1990, p. 66) To date this has not been incorporated into the law.

One of the major problems associated with such a proposal is the fact that police will be seriously hampered in their investigations as they rely heavily on the "voluntary attendance" of suspects and witnesses. The vast majority of police cases are solved by information - public information or privately obtained information flowing to the police.[10] The question then arises as to whether the police need a power to force the disclosure of this information from people or whether today's community will come forward of their own free will - recognising their important role in the maintenance of justice.

Some would argue that many in the community would prefer to "not get involved" in a criminal matter, involving as it does the potential disruption and inconvenience of being called to give evidence at a trial. The community must then decide to what extent the individual's right should be protected at the expense of the community.

Certainly, the police would argue, if all suspects knew their rights, the number of those who participate in records of interview would be sorely diminished. This may be true and it may significantly increase the difficulty associated with the job of policing if all suspects were informed of their rights. However, there seems little point in individuals having these rights if they are unaware of them.

It should be noted that many people do not wish to be seen attending at a police station or having police attend at their homes because of the speculation in which it may cause others to engage. Are there any circumstances under which it would be more appropriate for the police to speak to possible witnesses or suspects in some neutral territory?

The Right to Silence

Once a person attends at a police station, he/she may still exercise his/her right to silence and refuse to answer any questions (subject to any specific statutory exceptions). This right to silence appears to be much more widely known than the right to refuse to attend. If however, the person is unaware of his/her right

10 Mukherjee, S. 1991, 'Confronting Crime: An Evaluation of Australia's Crime Problems and Consideration of Crime Control Strategies', Paper prepared for *The Second Melbourne Criminal Justice Symposium, University of Melbourne*; Clarke, R.V., and Hough, M. 1984, *Crime and Police Effectiveness*, A Home Office Research and Planning Unit Report No. 79, London, HMSO; Skolnick, J.H. & Bayley, D.H. 1986, *The New Blue Line*, New York, The Free Press.

to refuse to accompany a police officer to a station, then once in the station, he/she is less likely to exercise his/her right to silence than if he/she were elsewhere. As McBarnet (1981, p. 61) has noted:

> "The accused is alone with the police and the formal structure creates an informal situation of unilateral power. The police are in a position to define what may be an ambiguous situation for the accused with no contradictory expertise to challenge it. Arrest, search, fingerprinting, questioning, being charged are all part of a degradation ritual which constructs an atmosphere of guilt. Alone with the police, the accused is exposed to only one version of how the law defines his behaviour, how the evidence looks against him, be he innocent or guilty, and what his chances are in court. Given their own involvement, interests, and indeed beliefs in the case the police are likely to create, with the best will in the world, a sense of pending conviction which makes co-operation, not silence, the only sensible reaction."

One writer points out that while many protections are provided for the accused at trial in our adversarial/accusatory system, that is not the situation pre-trial. Criminal investigation in our system is essentially inquisitorial and "there is no champion to assist the suspect, there is no impartial referee to ensure that the rules are complied with" (Odgers 1989, p. 78). He argues that the trial process is heavily influenced by the pre-trial investigation and that there is little point in giving safeguards at the trial unless you also provide protection at the pre-trial stage.

One option he suggests is that the adversarial system be brought back to the pre-trial stage - by ensuring that suspects have legal advice and the support of a knowledgeable lawyer who would ensure that there was no abuse of any kind of the suspect. He advocates a system where there is electronic recording and provision by the state of free legal advice for suspects.

Odgers recognised that the likely outcome of such a system would be that there would no longer be any admissions because "any lawyer worth his salt will advise his client that under no circumstances should he say anything at all to the police". He goes on to say:

> "I don't think that such a result is in the public interest. I don't think we should have a a system in which criminal suspects are encouraged to say nothing. Admissions are a necessary part of our legal system as long as there is no abuse by the police, and as long as statements made by the suspects are reliable. I see the right to silence as essentially something that has been developed historically to serve those goals, to ensure that there is no police abuse and to ensure that if the suspect does choose to speak that it is likely that the confession is reliable. If those goals are met by proper recording and the presence of a lawyer then I don't think you need the right to silence any more. I am not for a moment suggesting that a suspect should be compelled to speak. All I am talking about, of course, is the possibility of inferences being drawn from silence if the suspect remains silent." (Odgers 1989, p. 80)

A number of other writers have argued that the right to silence in its present form need not be retained. Wigmore states:

> "There was a need for it three centuries ago, as a safeguard against an extraordinary kind of oppression, which, like witchcraft has passed away forever. Is there a demand now? I think that the history of the privilege shows us that in deciding these questions we may discard any sanction which its age would naturally carry." (1891, p. 85)

Marks J. of the Victorian Supreme Court made an extensive study of the history of the privilege against self-incrimination and concluded that the:

> "law about silence . . . is substantially the fortuitous product of long past religious, social and political upheavals. Perhaps that does not necessarily make it bad, but might explain why, as I think is the case, its operation has failed to satisfy the needs of today's community." (1984, p. 372)

The Lucas Committee (1977, p. 152) also recommended that the rule which prevents the drawing of an adverse inference from a suspect's silence in response to police questioning should be abolished. They proposed that while a suspect retains the right to silence, if it is exercised the suspect runs the risk, in an appropriate case, of the court drawing an inference adverse to him or her because of the failure to speak.

There are a number of arguments in support of the right to silence. There are many reasons for silence consistent with innocence. The suspect may not wish to tell police of conduct on his/her or another's part which is highly embarrassing, though not criminal. The suspect may wish to remain silent in order to protect someone else. Sometimes the suspect may believe it is better to remain silent than to risk generating misunderstanding. Many people suspected of committing offences are inarticulate, poorly educated, suspicious, frightened and suggestible. Thus they are not able to deal with police questioning and therefore the right to silence protects them.

The arguments for both sides are highly persuasive.[11] What is exemplified in the debate is the need to look at all the safeguards in the pre-trial and trial processes in deciding whether any more are needed or whether any can be abolished.

Some Issues for Consideration are:

- Should the position of "voluntary attendees" be more clearly defined?
- What, if any, of the rights and protections accorded to a person in custody should also extend to a person who has attended at a police station but is not "under arrest"?
- Should the police have a pre-arrest power to detain a person for questioning?

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11 For a more detailed explanation of the arguments see "Police Interrogation and The Right to Silence", S Odgers, A.L.J., Vol 59, Feb 1985, p. 78.

- What safeguards should apply?
- Is the present law too protective of the rights of suspects, or too much in favour of the police?
- Is the right to silence still justified, or are there circumstances in which it should be modified?

THE POWER OF ARREST

Background

Osborn's Legal Dictionary defines arrest in the following manner:

> "To arrest a person is to deprive him of his liberty by some lawful authority for the purpose of compelling his appearance to answer a criminal charge."

In order for the police to effectively carry out their duties of detecting and preventing crime, the law gives them the power to arrest persons in certain circumstances.

By definition the act of arrest deprives individuals of their fundamental right to live their own lives free from undue interference and the consequences of an arrest such as subjection to searches, fingerprinting and photographing are further intrusions into the liberty of the individual.

Because of the sudden interference with a person's liberty which is caused by an arrest, the existence of a power of arrest necessitates the imposition of some controls on the exercise of the power in order to balance the competing interests of the need for law enforcement and the apprehension of offenders, and the rights of the individual.

The power to arrest can only be used for the purpose of bringing a person before a court, and is therefore, a part of the prosecution process not a part of the investigative process. Arrest was not designed to allow the police to detain a person for questioning or for other investigations, but to ensure his/her appearance before a court or justice.

Current Position in Queensland

There are two sources of the police officer's power of arrest - the common law and statutes. The common law rules in this state have been largely superseded by statutes.

Statutory Powers of Arrest Without Warrant

There are many statutes giving the police (and in some cases private citizens) power of arrest in particular circumstances. However, for offences arising under the Criminal Code the major provisions concerning arrest without warrant are sections 546 to 552 of the Criminal Code (Queensland).

Section 546 provides, in effect, that a police officer has the power to arrest a person without a warrant if the officer believes on reasonable grounds that the person *has committed* a crime.[12] It also provides that a police officer may, without warrant, arrest any person whom he/she finds lying or loitering in any place by night, under such circumstances as to afford reasonable grounds for believing that he/she *has committed, or is about to commit a crime.* The section further provides that it is lawful for any person called upon to assist a police officer in the arrest, unless the person knows that there are no grounds for the police officer's suspicion.

It is lawful for a police officer to arrest without warrant a person *found committing*:

(i) any indictable offence[13] ; or

(ii) any simple offence [14] which specifically authorises arrest without warrant where the person is found committing it (Criminal Code, s. 548).

Any person may arrest without warrant:

(i) a person *found by night committing* any indictable offence (Criminal Code, s. 549); and

(ii) a person believed on reasonable grounds to *have committed* an offence and who is escaping from the pursuit of a person believed to have authority to arrest him (Criminal Code, s. 550); and

(iii) a person who offers to sell, pawn, or deliver any property believed on reasonable grounds to have been obtained by means of an offence for which arrest without warrant is authorised (Criminal Code, s. 551).

A police officer witnessing a person committing a breach of the peace may arrest any person *found committing* it or and any person whom he/she believes on reasonable grounds to be about to join in or renew the breach of the peace (Criminal Code, s. 260) The Court of Appeal in *R v Howell* [1982] 1 QB 416 at 427 said that:

> "there is a breach of the peace whenever harm is actually done or is likely to be done to a person, or, in his presence, to his property, or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant."

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12 Subject to section 5 of the Criminal Code (Queensland) which provides that unless otherwise stated, a crime is an offence for which an offender may be arrested without warrant. There are a number of crimes under the Criminal Code for which a police officer cannot exercise a power of arrest without warrant. See, for example, sections 123, 126, 209, 215.

13 Indictable offences consist of crimes and misdemeanours - see section 3 Criminal Code (Queensland).

14 A simple offence is defined in the Justices Act (Queensland) 1886-1985 s.4, as meaning "Any offence (indictable or otherwise) punishable on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise."

The arrest provisions provided under the Criminal Code are fairly complex. There are numerous other statutes in Queensland under which police have a power to arrest.

Inconsistencies in Queensland Law

One of the obvious inconsistencies between the various arrest provisions in Queensland statutes is evident in the basis upon which a police officer can arrest a person, other than a person *found committing* an offence.

Some provisions of the Criminal Code (ss. 546 & 550) require a police officer to have reasonable grounds for *believing* that a person has committed an offence before arresting the person. Others require a police officer to have reasonable grounds for *suspecting* that a person has committed an offence (Criminal Code, s. 547).

Similarly other statutes vary in their terminology with many requiring a belief on reasonable grounds[15], others requiring a suspicion on reasonable grounds[16], and yet others requiring that it be the police officer's opinion that the person has committed an offence.[17]

Some authorities seem to suggest that a suspicion and belief are different states of mind (*Rockett v George* unreported 1990) and that a suspicion is less than a belief (*McIntosh v Webster* (1980) 30 ACTR 19 at 30). Others appear to be less clear in defining the terms (*Walker v Lovell* (1975) 3 A11 ER 107 at 116-117).

Suffice it to say that the provisions regarding grounds for arrest in Queensland are inconsistent and it is difficult to ascertain any reason for the inconsistency. A review of police powers should address this problem urgently so as to clarify and simplify the police power of arrest without warrant.

Exercise of Police Discretion

It should be borne in mind that there exists a power of arrest *not* a duty to arrest in most of these circumstances and arrest is not to be used as a matter of course in the cases where the power exists. The police officer is required to exercise a discretion as to whether the circumstances are appropriate for the exercise of the power.

In its 1987 Annual Report, the Police Complaints Tribunal expressed its concern over the use of arrest without warrant in relation to minor offences under the

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15 For example, Traffic Act s.42(3), Public Safety Preservation Act s.14, Children's Services Act s.70.

16 For example, Regulatory Offences Act s.8, Animals Protection Act s. 10, Noise Abatement act s. 40, Vagrants, Gaming and Other Offences Act s.34.

17 Traffic Act s.42(2), Hawkers Act s. 39(a).

Vagrants, Gaming and Other Offences Act such as obscene language, insulting words, unruly conduct etc. The Tribunal was of the opinion that the police officer's discretion was seemingly not exercised as objectively as required. The report stated that there is

> "a perceived tendency to effect an arrest because the power to do so exists, irrespective of what real mischief has been caused by the mere uttering of words which in many respects have lost any power to offend or induce revulsion in any ordinary persons (which after all is the test of obscenity)." (Police Complaints Tribunal Queensland, Annual Report 1987, p. 3).

The Tribunal expressed its concern at the potential flow-on effect of the exercise of these arrest powers in the following terms:

> "Frequently, the arrest for one of these offences triggers off allied offences, such as resisting arrest, and assault on a police officer in the execution of his duty. The offender, on many occasions, has been taken from or near his home; locked up for several hours; fingerprinted; searched; photographed and generally treated as a criminal. In addition to any trauma as far as the arrested person is concerned, there is the impact on and tension caused to the family." (1987, p. 3)

Furthermore, the Tribunal pointed out that the outcome of these matters was often the forfeiture of bail as a matter of convenience, which meant that there was no opportunity for the courts to review the officer's exercise of the power of arrest.

While recognising that the police need powers of arrest in situations that may cause concern to members of the public, the Tribunal said that it appeared from numerous complaints that the alleged offence often occurred in or near a private residence where no public element was involved, or late at night on roads where the alleged misconduct had no effect on the public, and in those circumstances the making of an arrest did not seem appropriate. They suspected that the arrest complained of in such circumstances was a "knee-jerk" reaction, if not a "get square" or "teaching a lesson" measure.

Use of Summons as an Alternative to Arrest

The General Instruction 1.23 of the Commissioner of Police provides that "members of the Police Service, even though authorized by law, should abstain, unless specifically instructed to the contrary, from making an arrest for a minor offence where proceedings by complaint and summons against the offender would be effective".

The Tribunal recommended that the spirit and intent of the General Instruction be observed and that, if complaints continued in the same vein, there be scope for some legislative action to lay down clear guide-lines when arrest may be made and for some vetting by senior officers of the exercise of discretion of other officers.

It appears that complaints did continue in the same vein as the matter was once again raised by the Police Complaints Tribunal Queensland in its Eighth Report, 1989 (p. 22). The Tribunal reported that it had considered instances where the power of arrest had been exercised mechanically, arbitrarily, without cause, or as a summary sanction. They referred to a matter that was pending at the time of presenting the report, where there was a formal statement by a member of the Police Service that the only reason why he arrested a person in exercise of a power to do so without warrant was because the person "was giving smart answers".

Furthermore, evidence was received from a very experienced and respectable member of the force that it is probable that many arrests are made without warrant, in circumstances where service of a summons would have been sufficient to preserve the peace, merely because it was more convenient to arrest (Police Complaints Tribunal Queensland 1989, p. 22). The convenience arises from the fact that often the police officer has to leave the suspect, locate a Justice of the Peace in order to have a summons sworn and then find the suspect again to serve the summons. Furthermore, the paperwork associated with the issue of a summons is time consuming.

It has been suggested that the power to arrest has often been used instead of the summons procedure, in cases where the summons procedure would be effective, because the power to arrest carries with it the associated power to fingerprint the suspected offender. If this is so, it appears to be inconsistent with the aim of the exercise of the power of arrest - to bring the person before a court, not to enable the police to investigate the offence.

One way to overcome the problem of arrest being inappropriately used in relation to minor offences, would be to remove the power to arrest without warrant in those cases. The difficulty is that, while in many cases the offence may not appear serious enough to justify arrest, there may be circumstances surrounding the commission of the offence which justify the exercise of the power. It is for this reason that the discretion has been conferred on the police officer.

Criteria for the Appropriate Use of the Power

An alternative solution is to examine the exercise of the police officer's discretion. Upon reaching the required reasonable belief or suspicion that a person has committed an offence, the officer must decide whether or not proceedings by way of summons would be effective in the circumstances.

The Australian Law Reform Commission (1975, pp. 18-19) believes that it is necessary to go further than just stating that general principle and suggested four criteria that should be satisfied in order to justify a belief that proceeding by way of summons would be ineffective.

These four criteria are:-

1. The need to ensure the appearance of the offender before a court of competent jurisdiction;

2. The need to prevent the continuation or a repetition of the offence for which the person is arrested;

3. The need to preserve evidence of, or relating to, the offence for which the person is arrested;

4. The need for "protective custody" under the provisions of the mental health, child welfare and similar legislation.

The Law Reform Commission's view was that these should be the statutory criteria for arrest and some of these have been embodied in the legislation of Victoria and the Commonwealth.[18]

Are these criteria appropriate?

Are there any other factors that should be taken into account?

Should these factors be embodied in the legislation or simply included in the Police Commissioner's General Instructions?

Notice to Appear

If it is the case that the power of arrest is used inappropriately because of the greater inconvenience associated with the alternative summons procedure, one solution may be to look at simplifying the summons procedure or providing more practicable alternatives. Various options have been considered in other jurisdictions.

One of the frequently considered options is the use of a "notice to appear" - a type of on the spot summons which could be written by the police officer and served immediately on the suspect on the street or at the station. The notice would name the day that the person was to appear before the court to answer the charge. It would be similar to the existing notice issued for some offences under the Traffic Act, except that there is no fixed sum stated as a fine which the offender can pay in order to avoid attendance at court.

Such a notice differs from the ordinary summons procedure, only in that it is issued by the police officer at the time of apprehension of the suspected offender rather than by the court or Justice of the Peace for serving on the suspect. Because this procedure is simple, it is suggested that it would reduce the number of arrests without warrant in minor cases.

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18 See provisions of the Crimes Act 1914 (Cth) and Crimes Act 1958 (Vic).

The Australian Law Reform Commission (1975, p. 27) considered such a system in their report titled "Criminal Investigation" and rejected it after concluding that:

1. The procedure for issuing summonses by the court was relatively efficient in practice and it is the area of service that needs reform;

2. The safeguards inherent in the current summons system - where the report of an offence is subjected to the exercise of the discretion of a senior officer who decides whether to proceed with a prosecution - would be lost in the "on the spot" procedure;

3. There may be difficulties in requiring an inexperienced officer to complete accurately a summons form, especially in the more complex offences. In these complex matters there is often a need for back-up documents to be served and this would frustrate the intention of the on the spot summons;

4. There are practical difficulties associated with the police officer having to fix a court date and time.

Although the Australian Law Reform Commission was not in favour of the system, it has received some support from other quarters. The procedure is available in New South Wales under the Justices Act 1902 (ss. 100 AA, AB, AC) which provides that where a person is suspected of the commission of a criminal offence, certain members of the Police Force may authorise the issue of a notice for the attendance of the suspected person before the Local Court. The notice, which includes a statement of the nature and particulars of the alleged offence, requires the accused person to appear at the time and place specified in the notice " to be dealt with according to law". A failure to appear in accordance with the terms of the notice may result in the person's arrest, or in the matter being dealt with in the person's absence. The notice must advise the consequences of non-compliance. Furthermore, when the notice is served on the person, the police officer must explain the consequences of non-compliance and the accused person must sign for receipt of the notice (N.S.W. L.R.C. D.P. 1987, p. 45).

The Lucas Committee (1977, p. 125) recognised the difficulties associated with obtaining a summons from a Justice of the Peace and recommended that "with respect to all offences where police officers have the power to arrest without warrant, police officers be given the power to issue their own summons in a prescribed form to compel the appearance of persons suspected of having committed these offences before the court under penalty of arrest if they disobey.

All of these proposals recognise that alternatives to arrest exist and they should each be evaluated to see whether they can effectively overcome the problems currently associated with the exercise of the power to arrest without warrant.

The Need for Consolidating and Streamlining the Law of Arrest

As illustrated in the foregoing:

- The sources of the law of arrest are many and varied. If persons wish to know when, why, how and where a police officer may make an arrest, that person must peruse many complicated sections of the Criminal Code, and numerous other statutes which provide a power of arrest for certain other offences. In addition, one should also look at the various judicial interpretations of these many sections.

The result is uncertainty for the lay person who attempts to become informed of his/her rights and of the power of the police. It also makes it difficult for the police themselves to know the extent and the limits of their power of arrest.

The law of arrest is of such great importance because it is the act of arrest beyond which the individual's rights are subjugated to the authority of the state. Personal freedom ends at the time of arrest. There is a great need for the law to be expressed in the clearest terms, in language easily understandable and in a form which is easily accessible.

Some Issues for Consideration are:

- the circumstances in which the power of arrest may be exercised; including the necessity for such a power in the circumstances concerned;

- the procedure surrounding the exercise of such power; including the exercise of the police discretion to arrest;

- the consequences of any failure to follow the procedure set down including the adequacy of the administrative and legal controls over the exercise of discretion.

- matters ancillary to arrest: e.g. Power to enter premises for the purpose of arrest; use of reasonable force in making an arrest; informing the suspect of the reason for an arrest.

POST-ARREST POWER OF DETENTION

Current Position in Queensland

At common law there is no power to detain a person for questioning after arrest - the arrested person must be taken before a justice "as soon as practicable" unless granted bail. The problems which have arisen in this area have been the subject of much debate over the last decade.

Whilst we often read that a person has been "detained for questioning" by the police, Queensland police have no power to detain a person for questioning without arresting the person. Many persons are requested by the police to accompany them to the police station for the purpose of assisting the police in their enquiries, and whilst there is no power to compel their attendance, many people attend because they are not aware that they have a choice. Once at the station, some people may remain for lengthy periods prior to arrest because they do not realise that they are free to leave, and are not told so, or because they prefer to co-operate rather then be arrested.

In practice, whilst there is no formal power to detain a person who is not under arrest, the police continue to rely on the apparent consent of the person when in many cases it must be obvious that the person would not remain if he/she did not believe that he/she had to. As the Lucas Committee (1977, p. 133) pointed out in their report, whilst it is quite common for people to voluntarily accompany police to the station, the suspect does not know that he/she does not have to go and the police officer does not tell him/her that he/she is not obliged to go. In fact the Committee were of the opinion that in the great majority of cases, the suspect is simply taken to the police station - he/she is given no choice in the matter. The question of the need for a power to detain a person for questioning without arrest was addressed more fully in the section "Voluntary Attendance" supra.

The position differs considerably after a person has been arrested. The power of a police officer to question a suspect is severely limited after arrest. Furthermore, after arrest the obligation is on the police officer to take the person "forthwith" or "as soon as practicable" before a justice to be dealt with according to law unless sooner granted bail. The words "forthwith" and "as soon as practicable" have been the subject of much judicial interpretation over the years, with some divergent views displayed as to the common law requirement.

Historical Perspective

It is necessary to look briefly at the development of the common law requirement that a person be taken before a justice in order to put the current debate in context. The common law requirement that a person be taken before a justice as soon as reasonably practicable developed during the time when the roles of the justice and of the police differed somewhat from the present. Prior to

the middle of the 19th century, the justice before whom an arrested person was brought was required to perform an inquisitorial function. The justice interrogated the arrestee and the witness and the arrestee had no right of representation before the justice. The role of the justice was very similar to that of the police of today. In the mid 19th century, statutory changes resulted in the role of the justice becoming a more judicial one and it became the responsibility of the police to conduct inquiries as to whether the suspect should be charged. However, whilst the police gained the function of investigating the alleged commission of crimes, they were not endowed with the justices' power of interrogation.

In short, the old system required the police officer to bring an arrested person before a justice as soon as reasonably practicable so that the justice could question the arrestee and cause the circumstances of the alleged offence to be investigated. Under the current system in Queensland the requirement remains, embodied in statute, but neither the justice nor the police officer has any power to delay the taking of the person before the justice in order to examine the arrested person after the arrest is made (except for specific statutory provisions relating to fingerprinting etc).

Primarily the problem which arises concerns the admissibility of confessional evidence obtained during questioning of the accused after arrest and before being taken before a justice. The courts have a discretion to exclude evidence which is obtained during a period of unlawful detention, and have frequently exercised the discretion. Accordingly the issue that has arisen is to what extent a person may be lawfully held for questioning after arrest and before being taken before a justice.

In the English case of *Dallison v Caffery* [1965] 1 QB 348 Lord Denning stated his view of the duty of the police officer in the following terms:

> "When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says he was working, for there he may find persons to confirm or refute his alibi. The constable can put him up on an identification parade to see if he is picked out by the witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice." (*Dallison v Caffery* [1965] 1 QB 348 at 367)

Whilst Lord Denning recognised some legitimate purposes for deferring the taking of a person before a justice, Australian cases have not followed this approach. Jordan C.J., in the earlier New South Wales case of *Bales v Parmeter* (1935) 35 SR (New South Wales) 182 at 189 stated that the duty of an officer who arrested a person under the common law power of arrest for felony, was to take the arrestee before a justice "without unreasonable delay and by the most reasonably direct route" and that any detention designed to facilitate the taking of that person to any other place would be unlawful. The South Australian cases of *Drymalik v Feldman* [1966] SASR 277 and *R v Conley* (1982) 30 SASR 266 also

rejected the English approach as did the Victorian Courts in *R v Banner* [1970] VR 240 and *R v Clune* [1982] VR at 1. The Australian courts held that at common law, detention solely for the purpose of investigating the offence is unlawful.

Williams Case

The position in Australia was the subject of much discussion in the judgements of the members of the High Court in the case of *Williams v The Queen* (1986) 161 CLR 278 on appeal from the Tasmanian Court of Criminal Appeal. The facts of the case are that Williams was arrested at about 6 a.m. one morning, having been seen in the act of committing a burglary. He was suspected of committing other crimes and, after his arrest, he was interviewed in relation to the burglary and a number of other offences for approximately 7 hours, in the course of which he made confessions to the offences. He was not taken before a justice until the following morning - some 26 hours after his arrest. The trial judge found that it would have been practicable to take Williams before a Magistrates Court within approximately six hours of his arrest but the police detained him for the purpose of interviewing him. In the exercise of his discretion the trial judge refused to admit the records of interview in evidence on the grounds that the confessions had been obtained during a period of unlawful detention.

On appeal to the Court of Criminal Appeal (*R v Williams & Kelly* Serial No. 20/1985, unreported), the court examined the provisions of section 34A(1) of the Tasmanian *Justices Act* 1959 which required a person taken into custody to be taken before a justice "as soon as practicable" and concluded that the phrase would encompass the time taken to establish whether charges should be laid and if so what charges. The majority of the High Court however took a somewhat more restricted view of the provision.

After reviewing a number of Australian cases on the point, Mason and Brennan J.J. said:

> "If a person cannot be taken into custody for the purpose of interrogation, he cannot be kept in custody for that purpose and the time limited by the words 'as soon as practicable' cannot be extended to provide time for interrogation. Therefore, it is unlawful for a police officer having the custody of an arrested person to delay taking him before a justice in order to provide an opportunity to investigate the person's complicity in a criminal offence, whether the offence under investigation is the offence for which the person has been arrested or another offence." (*Williams v The Queen* (1986) 161 CLR 278at 295).

Their Honours rejected the approach taken by Lord Denning when they said:

> "The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished." (*Williams v The Queen* (1986) 161 CLR 278 at 299).

In their judgement, Mason and Brennan JJ. stated that the principle that detention for questioning and investigation is unlawful clearly applies to statutes requiring that the police officer take the arrested person before a justice "without undue delay" or "forthwith" and there is no reason why it should not also apply to statutes using such general words as "as soon as practicable". Thus it appears that the Queensland statutory provisions would not allow the police officer who has arrested a person to detain that person for questioning.

Justices Wilson and Dawson adopted much the same approach saying:

> "It would be unrealistic not to recognise that the restrictions placed by the law upon the purpose for which an arrested person may be held in custody have on occasions hampered the police, sometimes seriously, in their investigation of crime and the institution of proceedings for its prosecution. And these are the functions which are carried out by the police, not for some private end, but in the interests of the whole community. Instances of legislative modification of the common law in recent times may be seen as reflecting a need which the common law no longer meets. Nevertheless, we are not persuaded that the common law can be or ought to be modified in a way which appears to have been accepted in England following the decision in *Dallison v Caffery*. That is not how the law has developed in this country. In the absence of precise limits upon the suggested power of the police to detain an arrested person for questioning, it would be an unsatisfactory development, swinging altogether too far, in our view, in favour of increased investigative powers at the expense of individual freedom. There is no real protection for the individual in any formula which says that the police may not detain an arrested person longer than is necessary to enable them to prefer a charge. Obviously, there must be a reasonable time to formulate and lay appropriate charges for the purpose of bringing a person before a justice. The common law allows time for this and it is covered by the words 'as soon as is practicable'. But, it is something quite different to say that the police should be able to detain an arrested person to enable them, by further investigation, to gather the evidence necessary to support a charge. Such a power, without limits, might in some cases, particularly where the evidence is complex, be used to detain persons for longer periods than could be justified having regard to their basic right to freedom - a view which is reflected in the time limits provided in the legislative provisions to which we have referred." (*Williams v The Queen* (1986) 161 CLR 278 at 312).

Gibbs C.J. was the only member of the court to adopt the English approach and recognise that a police officer who has arrested a person reasonably suspected of having committed a crime must be allowed time to make such inquiries as are reasonably necessary either to confirm or dispel the suspicion upon which the arrest was based, including searching his house, taking him to persons who may support or disprove his alibi and conducting an identification parade (*Williams v The Queen* (1986) 161 CLR 278 at 284).

The High Court in *Williams Case* recognised that the rule does nothing to assist the police in the investigation of criminal offences, but protects the personal liberty of the subject. If the balance between such liberty and the exigencies of criminal investigation is to be changed, that is a matter not for the courts but for the legislature. Mason and Brennan J.J. said at page 296:

> "If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody."

The legislatures of Victoria, South Australia and the Northern Territory have seen fit to alter the common law by allowing the police officer to detain the person arrested before the person is taken before a justice, for the purposes of an investigation. The period of detention varies from state to state - in South Australia it is for four hours, or for such longer period not exceeding eight hours, as may be authorised by a magistrate,[19] in Victoria it is for a "reasonable time" taking into account a number of factors listed in the legislation,[20] and in the Northern Territory it is for a "reasonable period".[21] The Australian Capital Territory has recently enacted legislation providing a maximum four hour period of detention for questioning with a maximum of two hours in the case of juveniles, Aborigines and Torres Strait Islanders.

Current Law and Proposals for Reform in Other Jurisdictions

Victoria

In 1983, a number of Victorian judges exercised their discretion to exclude confessions illegally or unfairly obtained, on the basis that the confessions took place after arrest and before the arrestee was taken before a justice while section 460 of the Crimes Act required the arrested person to be taken before the court as soon as practicable. Accordingly, the courts found the confessional evidence to have been obtained during a period of unlawful detention.[22]

The frequency with which the courts were rejecting evidence on this ground caused some concern and the Attorney-General requested the then Director of Public Prosecutions, Mr. John Phillips Q.C. to convene a Committee to examine the operation of section 460 of the Crimes Act - the section which required a person to be taken before a justice or a Magistrates Court as soon as practicable.

The Phillips Committee recommended that where a person had been lawfully arrested on reasonable suspicion of having committed an offence, the deferral of the taking of the arrestee before a justice or Magistrates Court in order to enable consensual interrogation or investigation was not to be considered an unlawful detention. The Committee clearly stated that the arrestee be made aware that no adverse inference would be drawn if the arrestee refused to answer questions or participate in investigative procedures. Furthermore, the Committee recommended that the period of detention be limited to an initial period of six hours, reviewable at the end of that period by a body independent of the police service, viz a Magistrates Court or the Clerk of the Court. Any extension was to be granted only with the consent of the arrestee. These recommendations were embodied in amendments to section 460 contained in the Crimes (Criminal Investigations) Act passed in 1984.

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19 Section 78 Police Offences Act 1953 as amended in 1985.
20 Section 464A Crimes Act 1958 inserted in 1988.
21 Section 137 Police Administration Act as amended in 1988.

The operation of the amended section 460 was closely monitored, especially by the police who found it unsatisfactory and requested an extension of the time period prior to review from 6 hours to 24 hours. As a consequence, the Attorney-General appointed a Committee chaired by the new Director of Public Prosecutions, Mr. John Coldrey Q.C. to examine the effectiveness of the new section 460. The Consultative Committee on Police Powers of Investigation (referred to as the Coldrey Committee), presented the Report on Section 460 of the Crimes Act 1958 in April 1986.

The Coldrey Committee saw its brief as determining whether the amended section 460 struck a reasonable balance between the public interest in convicting the guilty and the public interest in protecting the individual from unlawful and unfair treatment. If the section failed to strike such a balance, the Committee attempted to find a formula which did.

The Committee looked at the statistics which indicated that 99.5 percent of all consensual interrogations and investigations were completed within 6 hours of the suspect being taken into custody. They accepted the police submission that the complex cases (often of most public concern) were the ones most likely to fall outside the 6 hour limit. In the Committee's opinion it was in the community interest to enable the police to legitimately obtain evidence that would assist in the securing of a conviction of the guilty, and they recommended the removal of the specific time restraints and the substitution of a concept of reasonableness.

Whilst the Committee's recommendations recognised the need for the police to have increased flexibility in the conduct of investigations, they also recommended increased safeguards.

The recommendations were implemented by the Crimes (Custody and Investigation) Act 1988 (Victoria) which amended the Crimes Act 1958 (Victoria). The Act replaced the 6 hour permissible detention time with a requirement that the arrested person must be brought before a justice or a Magistrate within a "reasonable time", if not released unconditionally or granted bail. What constitutes a reasonable time depends upon the circumstances of each case and is to be determined by reference to criteria specified in section 464A. These include complexity of the matter, geography, time taken to communicate with legal advisers and relatives, need for medical attention, rest periods etc.

Certain controls have been imposed in conjunction with the extension of police powers, one of which involves the duty to inform those in custody of their rights including:

(i) the right to remain silent or to refuse to take part in any investigation (Crimes Act 1958, s. 464A(3));

(ii) the right to communicate or attempt to communicate with a friend or relative to inform that person of his/her whereabouts (s. 464C(1)(a)), and;

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22 See for example *R v Banner* [1970] VR 240, *R v Larson & Lee* [1984] VR 559, and *R v Curran & Torney* [1983] 2 VR 133.

(iii) the right to communicate or attempt to communicate with a legal practitioner (s. 464C(1)(b)).

The investigating official must inform the person in custody of these rights and must defer the questioning to enable the person to make communication, unless the investigating official believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence, or that the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed (s. 464(1)(c) & (d)).

South Australia

Prior to 1985, the position in South Australia followed the common law and the police had no power to detain a person for the purpose of interrogation. A person arrested without a warrant had to be delivered forthwith into the custody of the officer in charge of the nearest police station and either released on bail or taken before a judge as soon as was reasonably possible (N.S.W. L.R.C. D.P. 1987, p. 57).

In 1985, the Police Offences Act was amended and renamed. The Summary Offences Act 1953 contains a limited power to detain a person after arrest and prior to delivering him/her into custody at the nearest police station, for the purpose of investigating the offence (Summary Offences Act 1953 (SA), s. 78). The power can only be used in relation to serious offences.[23]

The period of detention is for as long as may be necessary to complete the investigation or the prescribed period, whichever is the lesser. The prescribed period is four (4) hours or such longer period (not exceeding eight hours) as may be authorized by a magistrate. In calculating the prescribed period, account shall not be taken of any delays occasioned by the time spent waiting for the arrival of a solicitor or other person.

Safeguards similar to those in Victoria have been incorporated including the requirement that the police notify the arrested person of his/her rights including:

i) the right to refuse to answer any questions;

ii) the right to make one telephone call to a relative or friend in the presence of a police officer;

23 A serious offence is an indictable offence punishable by imprisonment for two years or more. Note that this differs from the position in Victoria and Northern Territory where the power to detain is exercisable in the case of any offence.

iii) the right to have a solicitor, relative or friend present during any interrogation; and

iv) the right to be assisted by an interpreter if necessary.

The arrestee must also be warned that anything said may be taken down and used in evidence.

The arrestee may be refused the right to make a phone call or to have a person present during the interrogation only when the officer in charge of the investigation has a reasonable suspicion that such communication would result in the escape of an accomplice or the tampering with evidence.

If a decision is made not to charge the arrested person, the police must return the person to the place of apprehension or to any other place reasonably nominated by the person (Summary Offences Act 1953 (SA), s. 78(5)).

Northern Territory

The Police Administration Act 1979 was amended in March 1988 and a new section 137 was inserted providing that, subject to subsection (2), a person taken into lawful custody shall be brought before a justice or court of competent jurisdiction as soon as is practicable after being taken into custody, unless he/she is sooner granted bail under the Bail Act or is sooner released from custody.

Section 137(2) provides:

> "Notwithstanding any other law in force in the Territory (including the common law), a member of the Police Force may, for a reasonable period, continue to hold a person he has taken into lawful custody in custody to enable:
>
> (a) the person to be questioned; or
>
> (b) the investigations to be carried out, to obtain evidence of or in relation to an offence involving that person, whether or not
>
> (c) it is the offence in respect of which the person was taken into custody; or
>
> (d) the offence was committed in the Territory."

In order to determine what is a reasonable period of time for the purposes of section 137(2), the court shall take into account a number of factors including the time taken for the interview of the suspect and or any witnesses, the number and complexity of matters to be investigated, the time taken for completing forensic investigations or conducting an identification parade, time taken to contact and await the arrival of a legal adviser and many other factors. Most of the factors correspond fairly closely to those contained in section 464A of the Victorian statute; however, the Northern Territory includes some factors which have no counterpart in the Victorian legislation.

New South Wales

There is no legislation in existence at the moment allowing post-arrest detention for questioning however the New South Wales Law Reform Commission has recently released a report "Police Powers of Detention and Investigation After Arrest" (1990) which recommends the introduction of such legislation in New South Wales.

The report makes it clear that none of the recommendations are intended to confer a power to detain against his/her will a person who is not under arrest.

It recommends that the power of arrest be predicated on a reasonable suspicion that a person has committed or attempted to commit a criminal offence.

The general rule proposed is that a person who is under arrest or otherwise in the custody of a police officer may be detained in the custody of the police for such time as is reasonable in all the circumstances, but for no longer than four hours of actual investigation from the time of initial custody. There is provision for extension of the time for up to eight hours by application to a judicial officer.

This power of detention after arrest can only be exercised on the ground that it is necessary:

(1) to follow up a reasonable suspicion in order to confirm or dispel these suspicions;

(2) to enable such further investigation and inquiries as are reasonably necessary to determine whether a prosecution will be launched and the nature of the charge(s);

(3) to complete any necessary documentation which requires the presence of the detained person;

(4) to establish the identity of the person; or

(5) to conduct other authorised investigative procedures such as an interview with the suspect (to be electronically recorded), interviews with witnesses, the taking of fingerprints, search of the suspect, premises or vehicle, photographing, medical examination etc.

The proposed "reasonable time" is to be determined by reference to a number of factors including whether the presence of the arrested person is necessary for the conduct of any investigations to be conducted after arrest; the number and complexity of the matters under investigation; whether the person is willing to make a statement; availability of premises in which to conduct an interview; number and availability of co-offenders, witnesses etc; time taken to conduct forensic tests and others.

The report also proposes the introduction of a formal system of custody officers whose responsibility it is to determine whether the detention is warranted, to maintain a custody record, to ensure that the required safeguards are afforded the detainee and to ensure that the Codes of Practice[24] are complied with. A full list of the duties is to be found in the report (N.S.W. L.R.C. 1990).

There are a number of safeguards proposed for the arrested person including a duty on the police officer to inform the person of his/her rights such as:

(a) the right to refuse to answer questions or take part in any investigation, from which no adverse inference may be drawn;

(b) the right to communicate or attempt to communicate with a friend or relative to inform that person of his/her whereabouts;

(c) the right to communicate with a lawyer, who should be entitled to be present at any interview;

(d) the right to an interpreter (where necessary).

Special rules are also proposed for children, Aborigines, persons with disabilities and non-English speaking persons.

At the end of the period of detention, the police officer must either release the person without charge, release the person on the basis that a summons has issued or will issue against the person or charge the person with a criminal offence. If charged, provisions for bail are to apply.

These provisions are to come into effect when a person is under lawful arrest or in a police station, police vehicle, or police establishment in the company of a police officer, or is otherwise under police control, and is being questioned, to be questioned or otherwise being investigated in relation to a criminal offence.

It is yet to be seen whether the New South Wales Government will adopt all or any of the recommendations but the Law Reform Commission has stressed the fact that the proposals form part of a package which should be accepted in its entirety.

Western Australia

The Western Australian position is similar to that in Queensland and enquiries did not reveal any proposed changes at the time of writing.

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24 The Code of Practice proposed by the New South Wales Law Reform Commission is based on that contained in the Police and Criminal Evidence Act 1984 (UK) which is described later in this section.

Tasmania

The Tasmanian Law Reform Commissioner's Report on Police Powers of Interrogation and Detention (1990) recommended that legislation be introduced to allow police to detain a person after arrest for up to four hours for the purpose of interrogation. Hand in hand with this power is a duty to record all interviews with the arrestee. It recommends a provision stating that if a defendant complains about a statement, and a videotape of the statement could have been made and was not made, then the statement will be excluded from evidence. It seems that none of the above provisions have been implemented due to the lack of funding available to provide all police stations with recording facilities. Until the police are in a position to be able to record the interviews, they will not be able to detain for questioning.

Australian Capital Territory and the Commonwealth

The Commonwealth Attorney-General recently introduced legislation which was passed in 1991, providing a period of lawful post-arrest detention. It is expected to take effect from the end of September, 1991. The Crimes (Investigation of Comonwealth Offences) Amendment Act 1991 applies to the investigation of all Commonwealth criminal offences and Australian Capital Territory offences punishable by more than 12 months imprisonment.

The period of detention provided is a maximum period of four hours (two hours in the case of a person under the age of eighteen years or an Aboriginal person or Torres Strait Islander), with provision for "dead time". "Dead time" is to be disregarded in the calculation of the detention period and consists of reasonable travel time to the nearest appropriate place of custody, time required to allow the arrestee to contact a person that he/she is entitled to contact under the Act, a reasonable period to allow the person contacted to arrive at the station, any time required to allow the arrestee to receive medical treatment or to recover from intoxication. There is also provision for an extension by a magistrate for a further eight hours in cases involving offences punishable by more than twelve (12) months imprisonment. The time taken to make the application to the magistrate is "dead time".

As is the case in other states' legislation, the Act contains several safeguards including:

- requiring that the person be informed of his/her right to silence and that anything he/she may say may be used in evidence;

- statutory rights for the person in custody to be permitted, prior to questioning, to have communication with a relative or friend or with a legal practitioner, and to have a legal practitioner present during questioning and investigation (except in cases where it is likely to result in an accomplice avoiding apprehension, interference with evidence or the intimidation of a witness, or if the danger to other people makes questioning a matter of urgency);

- mandatory recording of the interview with the arrested person;

- special provisions stating that a person under the age of eighteen or an Aborigine or Torres Strait Islander be interviewed in the presence of an "interview friend" as defined in the Bill; and

- provisions for an interpreter in the case where the person is not fluent in English, and for contact with the consular office in the case of a foreign national.

This Act is unique in including a provision that "a person who is under arrest must be treated with humanity and respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment".[25]

There is no power to detain a person who is not under arrest, as defined in the Act. For the purposes of the Act, "under arrest" includes situations arising when an investigating official has formed the opinion that there is sufficient evidence to establish that a person has committed an offence about which he/she is to be questioned, when the official would not allow the person to leave if the person wished to do so, or when the official has given the person reasonable grounds to believe that he/she would not be allowed to leave.

England

The Police and Criminal Evidence Act 1984 was introduced after much debate. This was a response to the recommendations of the Royal Commission on Criminal Procedure set up in 1977, which reported to the Government in 1981.

The Act greatly extends the power of the police to arrest and detain a suspect for questioning and investigation. It regulates the conditions and duration of detention and makes provision in the associated Codes of Practice for the questioning and treatment of detained suspects.

The provisions of the Act are complex and detailed. Effectively they allow the police to detain a person, in certain circumstances, for up to 96 hours.

Where a person has been arrested and detained, his/her detention must be reviewed by a custody officer not later than six hours after the detention was first authorised by the custody officer. The second review shall not be later than nine hours after the first, and subsequent reviews shall be at intervals of not more than nine hours (Police and Criminal Evidence Act 1984, s. 40).

A review may be postponed if the review officer is satisfied that it would interrupt questioning then in progress and would prejudice the investigation, or where no review officer is readily available at the time.

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25 Crimes (Investigation of Commonwealth Offences) Act 1991, s. 23Q. The New South Wales Law Reform Commission proposed a similar clause in their recommendations contained in the Report on Police Powers of Detention and Investigation After Arrest.

In the case of a person not yet charged, the review officer must determine whether to charge the suspect or not, whether to release the suspect on bail or to detain the suspect further. If the person has been charged, the review officer has only to determine whether to grant the person bail or to continue the detention. There is provision for the detained person or the person's solicitor to make representations to the review officer about the detention (Police and Criminal Evidence Act 1984, s. 40(12)).

In the case of a person who has not been charged, the police are not authorised to detain him/her for more than 24 hours unless a police officer of the rank of superintendent or above who is responsible for the station at which the person is detained has reasonable grounds for believing that:

(a) such detention is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning him/her;

(b) the offence for which the person is under arrest is a "serious arrestable offence" (as defined in s. 116); and

(c) the investigation is being conducted diligently and expeditiously (Police and Criminal Evidence Act 1984, s. 42).

For the first 36 hours there is no need to make application to the court for continued detention. After 36 hours the person must be released with or without bail unless his/her further detention has been authorised by a Magistrates Court (s. 42(10)). The maximum period for which a person may be held is 96 hours.

> "This rather late stage was adopted for several reasons. First, the government wanted to avoid premature applications to magistrates' courts. Secondly, it wanted to avoid overburdening the system; about 22,000 people each year are detained for 24 hours, but only a few hundred are detained for as long as 36 hours. Thirdly, the hearing is *inter partes*. The police will have to disclose at least a substantial part of their case and this, it was felt, would favour professional criminals unduly, though why this should be so was not fully explained. Presumably, it was felt that the suspect's solicitor might inadvertently disclose sensitive matters to the suspect's associates.
>
> Ninety-six hours is, of course, a very long time for detention before charge, even granting that magistrates' courts will deal with the matter at least at the 36 hour and 72 hour stage. It is not, of course, longer than the periods permitted in some western European jurisdictions though much longer than the allowable periods elsewhere in the common law world. It should be recalled that before the Police and Criminal Evidence Act 1984, people were held "assisting the police in their inquiries" for even longer periods. The Act does, it is true, impose limits, albeit liberal ones from a police viewpoint. Ninety-six hours was chosen on the basis of police and Customs and Excise experience as specifying a period within which, in practice, even the most difficult cases could be cleared up. Three examples were given. The first, concerning cocaine, required 66 hours before forensic tests were completed. The second, involving an attempted armed robbery, took 72 hours. The third, involving an armed robbery, took 72 hours. The fact that these cases clustered around the 72 hours mark was instrumental in inducing the government to insert (under pressure) an additional magisterial review at that stage."

Where a person has been arrested for an offence, the custody officer at the station where he/she is detained is to determine whether there is sufficient evidence upon which to charge the suspect with the offence for which he/she was arrested. This must be done as soon as practicable after the arrestee arrives at the station. The custody officer may detain the person at the police station for as long as is necessary to enable him/her to discharge this function (Police and Criminal Evidence Act 1984 (UK), s. 37).

The Need For Reform

Of primary importance is the need to balance the competing interests of the need for effective law enforcement and the protection of personal liberties.

Bearing this in mind, a number of issues must be addressed in relation to whether there is need for reform of the current Queensland law relating to post-arrest detention.

One of the arguments raised in support of the power is the need for the common law rule, embodied in statute, to be reviewed and refined in light of today's society where the sophistication of crime and the professionalism of the police service is far superior to that of the time of the original rule. As stated earlier, the development of the rule that the arrestee must be taken before a justice forthwith occurred at a time when the role of the justice and the police differed somewhat from that of today. It has been said that whilst the common law rule continued to provide a safeguard for the rights of the individual, it may now constitute an impediment to the successful investigation of crime (Review Committee established by the Attorney-General 1989).

This was recognised by Wilson and Dawson, J.J. in *Williams v The Queen* (1986) 161 CLR 278 at 312:

> "It would be unrealistic not to recognise that the restrictions placed by the law upon the purpose for which an arrested person may be held in custody have on occasions hampered the police, sometimes seriously, in their investigation of crime and the institution of proceedings for its prosecution. And these are functions which are carried out by the police, not for some private end, but in the interests of the whole community. Instances of legislative modification of the common law in recent times may be seen as reflecting a need which the common law no longer meets."

Some Issues for Consideration are:

- Should the police be granted a power to detain a person for questioning or to enable further investigations to be made after arrest?

- If so, should it be for a fixed time period or a "reasonable period"?

- What safeguards should be imposed? e.g. Audio/Video recording of all conversations; right to a lawyer/friend etc; establishment of a central register where details of all detainees are recorded; establishment of a 'custody officer', etc.

- Should police have a pre-arrest power to detain a person for questioning (as discussed in the section "Voluntary Attendance" supra)?

SEARCH OF PERSONS, VEHICLES AND TAKING OF SAMPLES

Current Position in Queensland

Pre - Arrest Power

There is no general power either at common law or under statute for a police officer to stop and search a person and seize property unless the person is under arrest. However, there are a number of statutes in Queensland which confer on police a power of search in limited circumstances. Some examples of these circumstances are:

(i) if a police officer reasonably suspects a person to have drugs etc in his/her possession or in his/her vehicle (Drugs Misuse Act 1986, ss. 14 & 15);

(ii) if a police officer suspects on reasonable grounds that a person has possession of a weapon (Weapons Act 1990, s. 43);

(iii) if a police officer of the rank of sergeant or above reasonably suspects a person to have possession of stolen goods (Vagrants, Gaming and Other Offences Act 1931, s. 24(b));

Similar provisions exist in other states' legislation.[26]

There are over twenty sections in different Acts which authorise a police officer to search a person and/or a vehicle in particular circumstances. The issue of consolidation of police authorities was raised earlier in this paper and it should be given some consideration in respect of the power to stop, search and seize property.

Some of the more recently enacted provisions include safeguards such as a requirement that the police officer provide the person searched or owner of the vehicle with the officer's name, rank and station (Drugs Misuse Act 1986, s. 19). Furthermore there is a requirement that a register be kept in which the details of the search are entered (Drugs Misuse Act 1986, s. 20). Should such safeguards be applied to all searches?

Some statutory provisions provide power for the police to perform more intrusive procedures such as taking samples or conducting internal body cavity searches. For example, if a police officer reasonably suspects a driver of being under the influence of alcohol he/she may require the driver to provide a specimen of breath (Traffic Act 1949, s. 16A).

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26 See Bishop J, *Criminal Procedure* Butterworths 1983, p. 64 footnote 5, 6, 7 and 8.

The most extensive and controversial provision is contained in the Drugs Misuse Act 1986. Section 17 of that Act provides for a police officer of or above the rank of Inspector to require a person whom he/she reasonably suspects of having secreted within his/her body a dangerous drug, to submit to an internal examination by a medical practitioner. It seems that this power is most often exercised upon receipt of information that a person has drugs secreted in a body cavity.

The provision does not require the consent of the suspect - if the suspect refuses, the examination may be conducted using such force as is reasonably necessary.

Post-Arrest Power

The common law and the statute law both provide a power for the police to search a person in custody in some circumstances. The common law powers include power to search an arrested person and seize items which afford evidence of the offence charged,[27] and to search a person and seize items with which the arrested person might seek to harm himself/herself or other persons.[28]

There are a number of statutory provisions in Queensland which authorise the search of a person in custody. Section 680A of the Criminal Code authorises the search of a person arrested on a property-related offence and the seizure of any property reasonably suspected of being stolen or unlawfully obtained. This section also authorises the search of the person's vehicle.

The most comprehensive provision is contained in Section 259 of the Code. It authorises a police officer of the same sex as the arrestee or a medical practitioner acting at the direction of a police officer to search a person who is in lawful custody upon a charge of committing an offence and take possession of anything that may afford evidence of the commission of an offence. It also provides that a doctor acting at the direction of a police officer and with the written consent of the arrested person or the approval of a magistrate, may:

- examine the person including the orifices of his/her body;
- take samples of blood, saliva or hair;
- require the person to provide a sample of urine;
- take from the person's body any substance or thing provided the taking is unlikely to cause bodily harm to the person if he/she co-operates therewith.

27 *Bessel v Wilson* (1853) 20 LT (OS) 233; *Dillon v O'Brien* (1887) 16 Cox CC 245 at 249.
28 *Leigh v Cole* (1853) 6 Cox CC 329; *Lindley v Rutter* [1980] 3 WLR 660.

The section also provides for a dentist acting at the direction of a police officer and with the written consent of the arrestee or the approval of a magistrate to:

- examine the mouth of a person in custody;
- take samples of his/her saliva;
- take dental impressions from him/her.

If the arrestee does not consent to the doing of an act, a police officer may make application to a magistrate for an order that the act may be done without consent. Such approval shall not be given by the magistrate unless he/she is satisfied that the person is in lawful custody upon a charge of committing an offence, that there are reasonable grounds for believing that the doing of the act may afford evidence of the commission of the offence and that the person has been informed of his/her right to have two persons of his/her choice present while the act is being done. Where practicable, a portion of the sample is to be provided to the person who has had the sample taken.

The Coldrey Committee Report in Victoria

The Coldrey Committee, in its "Report on Body Samples and Examinations" described the Queensland provision as "arguably the most comprehensive in Australia" (1989, p. 75) at that time. The Committee were considering the question of the need for greater powers for the Victorian police to enable identification of offenders through these procedures. In canvassing the issues, the Committee had this to say:

> "The justification for granting a power to carry out a specific procedure or conduct a particular examination depends upon an evaluation of such matters as the inherent reliability of the procedure or examination and the need for its utilisation as an investigative tool. If the balance falls in favour of the grant of the power, further issues must be addressed."
>
> "These include:
>
> (i) at what stage in the investigative process should a suspect be exposed to the exercise of a particular police power?
>
> (ii) should the activation of the power be authorised by a senior police officer, a Magistrate or a Judge?
>
> (iii) should the exercise of such power be subject to the enactment of precise procedures and safeguards against abuse?
>
> (iv) should a breach of any such legislative enactment by investigators render the evidence garnered inadmissible, or, further, should such breach be an offence in itself?
>
> (v) should the power to conduct the procedure carry with it a right to use reasonable force in order to administer it?

(vi) should the refusal of a suspect to participate in a compulsory procedure enable an adverse inference to be drawn against him or her in any future trial?

(vii) if forensic testing involves the obtaining of samples from a suspect should a portion of the material be made available to the suspect to enable independent testing?

(viii) if no prosecution is commenced, or if a prosecution is terminated, or if an accused is acquitted, should items such as fingerprints, photographs or body samples obtained during the investigative phase be automatically destroyed?" (Coldrey Committee 1989, p. 12).

This was the framework of the Committee's analysis. The Committee ultimately recommended that the police be given the power to conduct the following tests and examinations:

> "the conduct of physical examinations to observe injuries such as bruises, cuts, scratches, and distinguishing marks such as tattoos, birth marks (and if appropriate photograph them); the taking of gunshot residues from external skin surfaces, hair samples, fingernail scrapings, blood samples and, as an alternative to blood sampling, scrapings from inside the mouth." (Coldrey Committee 1989, p. 1).

> "In essence the introduction of compulsory procedures will have no marked impact upon the role of serious crime in this state since those crimes for which these procedures are potentially important constitute in the order of only two percent of major crime. Consequently the justification for the utilization of these procedures cannot be grounded on any quantitative analysis but on the qualitative basis that the proposed techniques have the capacity to play a significant role in the investigation and prosecution of a small number of very serious offences." (Coldrey Committee 1989, p. 53).

Excluded from consideration were procedures involving the removal of foreign objects from within the body of a suspect by surgical or other means, including internal search of body cavities, as the Committee felt that they were more appropriately dealt with in the examination of search and seizure laws which it was to undertake next.

After an analysis of the use in investigation and identification of offenders, the Committee was of the view that the taking of physical measurements, saliva, semen and urine samples and dental impressions were not justified.

Effect of Civil Rights

Any consideration of the issues associated with such intrusive powers must address not only how the powers will enhance police investigation but also the many social issues involved. Of major importance here are the civil rights of the individual in the community.

Australia is a signatory to the United Nations sponsored International Covenant on Civil and Political Rights which, while of limited effect until passed into law, sets out standards which ought to be observed. Those articles of particular significance to this subject are as follows:

• **Article 7**	"No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. . ."
• **Article 10**	"Persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person";
• **Article 14 Paragraph 2**	"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law";
• **Article 17 paragraph 1**	"No one shall be subjected to arbitrary or unlawful interference with their privacy".

The provisions of Section 259 allow compulsory physical examination and the taking of body samples, without the consent of the person, which procedures arguably constitute a threat to the dignity of the person who is subjected to the process, as well as the possible risk to the health of the person. The provision authorises the use of reasonable force where the suspect does not co-operate and this has the potential to contravene the Convention.

It is necessary to be very careful of the terms under which such power is granted so as to ensure that the requirements of law enforcement do not infringe the rights of the individual as defined.

Rather than provide the police with such a power to take intimate samples or perform examinations without the consent of the suspect, some jurisdictions have chosen an alternative. The Police and Criminal Evidence Act 1984 (s. 62) of the United Kingdom provides that an intimate sample may only be taken with the written consent of the suspect. Where the consent of the suspect is refused without good cause the court or jury may draw an adverse inference against the suspect.

This type of provision may avoid the possible contravention of Article 7 of the U.N. Convention because of the absence of the power to compel a suspect to be subjected to the procedure, however it raises some difficulty in terms of the presumption of innocence. The presumption of innocence is a fundamental tenet of our criminal justice system. A person is presumed innocent until

proven guilty, and the suspect has the right to require the prosecution to prove the case against him/her, without his/her assistance. The drawing of an adverse inference where the accused does not consent to an intimate body sample procedure appears to be a breach of this principle.

The third article of significance involves privacy - a right that has been of growing importance in the community as demonstrated by the heated debate over the proposed Australia Card. The right to privacy competes with the interest of the community in preventing and detecting crime and apprehending offenders. In this context the privacy issues fall into two categories (Coldrey Committee 1989, p. 138).

(i) freedom from interference with one's personal space; and

(ii) control of information about oneself.

The Coldrey Committee went on to identify a number of questions that arose out of these issues including whether or not it is appropriate to have a power to carry out intimate procedures and, if so, by whom and under what conditions; by whom and for what purpose may information derived from the conduct of procedures be used; may such information be retained for future use, and, if so, under what circumstances.

Another argument that has been raised against granting the power is that it infringes the right against self-incrimination. Whilst the strict legal ambit of the rule relates to a person's right to refuse to answer questions that would, in the eyes of the judge, have a tendency to expose the person to a criminal charge, it has been argued that the philosophical underpinnings of the rule should extend equally to self-incriminating evidence other than answers to questions. In short, it is argued, it would be unfair to require people to provide evidence which could thereafter be used against them in a criminal prosecution.

That argument was not accepted by the Australian Law Reform Commission (1975, para. 134) which stated:

> ". . . The principle against self-incrimination should not govern these procedures (nor indeed medical examinations generally, nor the use of fingerprints, photographs and the like) so as to rule out absolutely the possibility of such evidence being obtained. The probative value of this kind of evidence is such that it ought to be obtainable and admissible, provided that enforceable safeguards for the accused are built into the system."

The distinction made is that body samples unlike interrogations, provide physical evidence that will not be influenced by the relationship between the interviewer and the suspect.

The Value of Forensic Procedure

The Coldrey Committee recognised the value of forensic procedure as being its capacity, either alone or in conjunction with other evidence, to implicate or exculpate a person suspected of crime. The end product of proper forensic tests is objective or real evidence and therefore there is a case for the granting of such powers to the police (Coldrey Committee 1989, p. viii).

Given its usefulness, is there a case for the extension of such powers to people who are not under arrest or not yet charged?

The Coldrey Committee recommended that the initial criteria for the exercise of the powers they recommended (which did not include internal search of body cavities) was "reasonable grounds to believe that the suspect in respect of whom the order is sought has committed the offence under investigation. (This is the standard required for an arrest)." Any lesser standard would "have the capacity to interfere with the liberty and privacy of members of the community in such a way as to be unjust, harsh, and oppressive in its operation" (Coldrey Committee 1989, p. xiii).

Whilst having the procedure available to the police prior to the arrest of a suspect will undoubtedly speed up an investigation, it is the degree of suspicion needed to justify an arrest which prevents such intrusive and humiliating powers being used without good cause. Any relaxation of this threshold would need to take into account the balance between law enforcement needs and the right to privacy.

Some Issues for Consideration are:

- On what grounds should police be able to search a person or his/her vehicle?
- Should the provisions relating to search and seizure of suspects and their vehicles be consolidated?
- Should all searches be subject to safeguards such as disclosure of the searcher's name, rank and station and the requirement that an entry be made in the register of searches?
- Are any other safeguards required?
- Should section 259 be amended in any way?
- Are the checks and balances provided in section 259 sufficient to protect the suspect?
- Comment is sought from health professionals who have been involved in the operation of the section in Queensland as to any issues they wish to raise.

IDENTIFICATION PROCEDURES

Fingerprints, Photographs etc

Many Queensland statutes[29] provide that the police can take the fingerprints, photographs etc of a person arrested for an offence, for the purpose of identification of the person. These Acts were drafted at different times and therefore, there is some inconsistency in the provisions. For example, the earlier Acts provide power to take fingerprints, photographs and palm prints while others specifically refer to footprints, voice prints, toe prints, and specimens of handwriting.

The statutes differ also in what must be done with the records of the prints etc. if the suspect is found not guilty or the charges are not proceeded with. Some say that the prints must be destroyed in the suspect's presence, others say in the presence of a suspect or person nominated by the suspect and still others say that it is only necessary to destroy the prints in the presence of the suspect if the suspect so requests. Clearly, there is a need to remedy the inconsistencies.

The various forms of prints, (fingerprints, handprints, footprints, etc. and photographs) afford an excellent means of identifying an offender and linking that offender to an offence. Consequently, the authority assists in improving investigations and solving crimes.

Countless offences have been solved by comparing fingerprints found at the scene of an offence with those held on record within the Police Service. In the year 1989-1990, 8,811 fingerprints were found at the scenes of crimes. Of this number, 1,782 offenders were identified from those fingerprints found. Obviously this identification can only occur where an offender's fingerprints have been previously obtained. Currently, 420,234 sets of fingerprints are held by police at the Fingerprint Bureau in Queensland. Fingerprints are kept on record for the purpose of comparison with any fingerprints which are found at the scene of offences in the future. Therefore, offences for which there would otherwise not be a suspect may be solved through a fingerprint comparison.

Where fingerprints etc. are taken upon arrest and prior to a person appearing in court, the opportunity exists for police to ascertain through the use of those fingerprints whether the person has a criminal history under another name. The discovery of a criminal history under an alias means that an offender's full record can be put before a court. This ensures that a sentence appropriate to the offence and the person's previous record may be given.

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29 Drugs Misuse Act, s.23; Firearms and Offensive Weapons Act, s.94; Gaming Act 1972, s.2(c); Hawkers Act, s.40; Pawnbrokers Act, s.53; Public Safety and Preservation Act, s.15; Second Hand Dealers and Collectors Act, s.60; Vagrants, Gaming and Other Offences Act, s.43; Casino Control Act, s.115; Invasion of Privacy Act, s.48A; Regulatory Offences Act s.8.

Earlier in this paper the issue was raised concerning the use of a "notice to appear" as an alternative to arrest. It was suggested that the procedure may result in a reduction in the number of persons arrested for minor offences.

One of the problems that is apparent however, is that the police may exercise the power to take fingerprints etc. upon arrest and that power is only available in respect of arrestees. Thus police may be reluctant to issue a notice to appear and forego the power to fingerprint etc.

It has been suggested that the power to fingerprint etc. be extended to persons appearing before the court in response to a notice to appear. Upon application the court could order that the person be taken into custody for a reasonable time to permit the taking of prints etc., or that the person attend a police station for that purpose.

The fingerprints and photograph etc. of a person charged with an offence may be taken prior to that person being convicted before a court of the offence in question. Effectively this means that, should the person be found not guilty of the offence or not be proceeded against by police, the person will have experienced an intrusion to his/her civil liberties by the taking of fingerprints and photographs from the person prior to being found guilty of an offence. Additionally, for the intervening period from the taking of the fingerprints and photographs until acquittal before a court, if that is the case, a person's fingerprints and photograph will be held in police records.

Identification Parades

An identification parade, where the suspect is paraded in a line of other persons of the same sex and approximately the same age and appearance for the witness to identify the perpetrator of a crime, is one of the judicially preferred types of identification.

There appears to be no authority for police to compel a suspect to participate in an identification parade. One of the arguments raised against such authority is that if the suspect does not wish to co-operate, he/she is well placed to undermine the whole procedure by drawing attention to himself/herself. It may be that since such a procedure is more favourable to the accused than in-court identification or a one to one confrontation with the witness, the accused may be quite willing to co-operate without the need for any coercive power.

On the other hand, there is no duty on a police officer to conduct an identification parade, not even upon the request of the suspect. Such an independent, properly conducted procedure may benefit the innocent accused and exculpate him/her in cases where identification is an issue.

Some Issues for Consideration are:

- Should the provisions concerning identification of offenders be consolidated?
- Should they be amended in any other way?
- Should the police be empowered to take fingerprints etc. of all persons arrested, or should the power be limited to specific offences?
- Should the police be empowered to take fingerprints etc. of persons appearing in court in response to a notice to appear? If so, on what grounds?
- When should the prints/photos be destroyed and what procedure should be followed in their destruction?
- Should the police be able to compel a suspect to participate in an identification parade?
- Is there a need for a provision obliging the police to organise an identification parade if the suspect so requests?
- If so, in what circumstances should the police be obliged to do so ?

SEARCH WARRANTS

Current Position in Queensland

When police reasonably suspect that property illegally obtained or illegally possessed or that evidence of an offence may be found in a place other than a public place they are, unless the occupier's consent is given, required to first obtain a search warrant in order to search that place. The warrant, ordinarily issued by a Justice of the Peace, provides the police with the authority to enter and search the place nominated in the warrant.

Many Acts currently empower police to obtain a warrant to search premises for evidence of an offence.[30] Police are required to obtain a search warrant under the particular Act which relates more closely to the offence being investigated, e.g. a Criminal Code search warrant for stealing, a Drugs Misuse Act search warrant for drugs and an Animals Protection Act search warrant for offences against animals.

In the main the provisions were drafted at different times on behalf of different Government Departments administering the particular Acts in which the authorities are contained. Consequently, there is no strict consistency in them. Some are issued by a Justice of the Peace, others by a stipendiary magistrate. They vary in the degree in which they specify what the police officer applying for the warrant must provide as justification for the issue.

Additionally, search warrants usually relate only to the search for material evidence of an offence or intended offence, eg. stolen property or the weapon used to commit an offence. They do not allow for a search for a suspect who may be hiding in privately occupied premises or for a victim who may have been abducted and restrained in a privately occupied place against his/her will except where it is suspected that a woman or girl has been unlawfully detained for immoral purposes (Criminal Code, s. 684).

In some limited circumstances police may be entitled under the common law to enter premises without the consent of the occupier. For example, a police officer can enter premises for the purpose of making an arrest if a crime has been committed and the offender has been followed to the premises; or for the purpose of preventing a murder occurring.[31]

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30 Drugs Misuse Act, s.18; Firearms and Offensive Weapons Act, s.91; Crimes (Confiscation of Profits) Act, s.30; Crimes (Confiscation of Profits) Act. s.31; Art Unions and Amusements Act, s.63; Criminal Code, s.679; Criminal Code, s.679B; National Crime Authority (State Provisions) Act, s.12; Censorship of Films Act, s.40; Children's Services Act, s.70; Fisheries Act, s.18; Fugitive Offenders Act, s.1; Health Acts.131A; Health Act, s.168A; Queensland Marine (Sea Dumping) Act, s.25; National Parks and Wildlife Act, s.15; Racing and Betting Act, s.231.

31 *Plenty v Dillon & Ors* (1991) 98 ALR 353, per Gaudron and McHugh JJ.

Furthermore, the common law may enable a police officer to seize property other than that which is named in the warrant if, in the course of a lawful search, the police stumble upon things bearing upon the commission of another offence by the occupier. Lord Denning enunciated the following principle of law in this area in *Ghani v Jones* (1970) 1 QB 693 at 706:

> "Where police offices enter a man's house by virtue of a warrant, or arrest a man lawfully, with or without a warrant . . . the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of they search they come upon any other goods which show *him* to be implicated in some *other* crime, they may take them provided they act reasonably and detain them no longer than is necessary." [32]

It has been suggested that this and other common law principles should be embodied in statute, along with other police powers. It may make it simpler for police to have all their power in legislation although it could also result in less flexibility in the law in this area.

Consideration should be given to whether these common law powers ought to be embodied in statute. Furthermore, should there be search warrant provisions to enable police officers to obtain a warrant to search for a suspect and/or a victim?

Modern search warrant provisions now take into account the vast size of Queensland and the isolation of many areas by providing that warrants may be obtained by means of telephone, radio, telex, facsimile, etc. It may be useful to extend this to all search warrant provisions.

The Drugs Misuse Act 1986 is currently the only legislation which allows for an emergency search in circumstances where evidence of an offence is likely to be destroyed in the period taken for police to obtain a search warrant.

It has been argued that such an emergency provision should be more widely available - for example, to apply where it is suspected on reasonable grounds that harm may befall a victim or evidence of any offence may be destroyed. In light of the comments of the Police Complaints Tribunal concerning search warrants in recent years, any extension of emergency power should be properly debated as part of a comprehensive review.

In 1987 the Police Complaints Tribunal recommended a review of the whole question of search warrants. Its report included an extensive statement about the frequent complaints about police searches under warrants. The Tribunal intimated that before any warrant is obtained the Justice of the Peace should be

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32 See the discussion of this decision, and/or of associated cases, in each of Weir, Police Power to Seize Suspicious Goods (1968) C.L.J. 193; Pearce, Judicial Review of Search Warrants and the Maxwell Newton Case (1970) 44 A.L.J. 467 at 472ff; Stephens, Search and Seizure Chattels (1970) Crim. L.R. 79, 139; Campbell and Whitmore, *Freedom in Australia* (2nd ed., Univ. of Sydney Press, 1973) at p. 65ff; Bridge, Search and Seizure: An Antipodean View of Ghani v Jones (1974) Crim. L.R. 218; Leigh, *Police Powers in England and Wales* (Butterworths, London, 1975) at p. 183ff; Reaburn, Search and Warrants in Milite and Weber, *Police in Australia* (Butterworths, Sydney 1977) at p. 165ff.

informed of the grounds on which any belief is founded so that he/she may be in a position to determine whether such belief is a reasonable one. Furthermore, the Tribunal considered that there may be scope to limit requests for the issue of warrants to Justices of the Peace who have some knowledge and experience of the judicial process (Police Complaints Tribunal Annual Report 1987, p. 4).

The matter was raised again at some length in the 1989 Report of the Tribunal (pp. 18-21) where the Tribunal more loudly made the point that the state of the law providing for review of justices issuing warrants was inadequate.

Some Issues for Consideration are:

- Should all Justices of the Peace be authorised to issue search warrants or should it be restricted to specified justices and/or stipendiary magistrates?
- Should general provision be made for granting of search warrants by telephone, telex, fax etc.?
- If so, in what circumstances and what procedures should be followed?
- Should there be different requirements based on the seriousness of the offences?
- With what degree of particularity should the warrant specify the articles to be seized?
- What should be the length of the warrant?
- Should the police officer be authorised to seize any other articles found in the course of searching under the warrant?
- If so, on what grounds should they be able to be seized?
- What should happen to the property that is seized?
- Should there be a register maintained in which the details of property seized is listed?
- Should provision be made for the issue of a warrant to search for a suspected offender who may be hiding on private premises ?
- If so, with what particularity should the suspect be described?
- Should provision be made to obtain a search warrant to search for a victim of an abduction?
- Should the statutory provisions relating to search warrants be consolidated?

- When, if ever, should entry onto premises without a warrant be justified?
- Who should be liable for the damage occasioned to premises where a warrant was executed?
- In what circumstances, if any, should compensation be available?

ELECTRONIC SURVEILLANCE

Current Position in Queensland

The increasing sophistication and complexity of crime has led to increasing calls for expanded police powers in the field of electronic surveillance. It may be that it is critical to the investigation of various serious crimes that police be given the power to listen to criminal conversations that are held in private, or via the telephone system, or to be able to covertly track the movement of criminals.

This need is particularly felt in the case of major drug investigations, and serious crimes such as terrorist activities and in hostage or siege situations. The investigations of some crimes are also very time consuming and the power to be able to quickly monitor the whereabouts of a suspect would greatly facilitate the expeditious conclusion of some police investigations.

Currently Queensland Police have the power to apply to the court for a warrant to install a listening device or a visual surveillance device in any place for the purpose of gathering evidence of an indictable offence.[33] The warrant can only be issued by a judge of the Supreme Court after the judge considers a set criteria.

The Queensland Police are also authorised under the Drugs Misuse Act to place a tracking device on a vehicle or vessel in which a person who is suspected of committing an offence against the Act may be travelling.

Telephone Interception

One of the more topical areas concerns the use of telephone interception techniques by state police.

The Commonwealth Telecommunication (Interceptions) Act provides that telephone interception is available to Australian Federal Police for a range of offences that are capable of being classified as "serious criminal offences."

In June 1987, the Federal Parliament formally gave the states power to enact phone-tap laws which mirrored those of the Federal Police, including the following safeguards:

- the need for state police to obtain intercept warrants from a Federal Court judge after evidence on oath;

- the requirement for audit - or scrutiny of interception activities- by an independent authority such as a state ombudsman;

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33 See the Drugs Misuse Act 1986 and the Invasion of Privacy Act 1971.

- the inadmissibility in court of any information wrongly obtained - with hefty penalties and the possibility of the "agency being revoked and withdrawal of the states' phone tapping rights".

Complementary legislation has since been enacted in New South Wales, Victoria, South Australia and Western Australia enabling those states' police officers to tap phones. To date this power has not been extended to police in Queensland, and the issue for resolution is now whether the Queensland police should also be granted similar powers. Queensland police also believe there are circumstances in which they should be granted the power to utilise electronic surveillance, without first needing to obtain judicial permission.

There is no doubt that powers of this nature are extremely powerful investigative tools.

With respect to the use of listening devices, the Australian Law Reform Commission (1975, p. 96) said:

> ". . . we think that the police ought not to be denied all the advantages of modern technology in fighting crime which itself uses it. Monitoring of conversations without the consent of either party ought to be permitted in certain narrowly defined circumstances."

The exercise of such powers is an infringement of the right to privacy. It is more intrusive than an ordinary search and seizure of physical evidence because the very nature of electronic surveillance tends to be exploratory, unselective and indiscriminate.

One of the most important matters to consider is whether there are sufficient safeguards upon the exercise of the current powers and in the federal legislation.

It is argued that the requirement that a warrant be issued by a judge constitutes a safeguard on the use of the power. Beverley Schurr (Proceedings of the Sydney Institute of Criminology 1988) raises some doubts about that, pointing out that the "available evidence is that judges in fact approve almost 100 per cent of the applications made before them for warrants."

She argues that the Australian federal warrant procedure provided by the 1987 amendments falls short of providing the protections necessary. For example, judges do not have to take into account either privacy interests or the extent to which other methods of investigation have been tried and failed; the procedure does not protect legal professional privilege; and it fails to include the innovation in the New South Wales Listening Devices Act requiring notice to be given to the Attorney-General of proposed application for warrants so that he/she has an opportunity to appear and be heard, representing the public interest.

Another interesting point to note is that in 1989 an Australian Federal Police submission estimated that each interception or tap cost $75,000. Schurr says that although such a cost may be justifiable in cases involving billion dollar imports into Australia, it may not be justifiable in cases where warrants were obtained in relation to offences such as break and enter into individual houses and serious stealing offences (Proceedings of the Sydney Institute of Criminology 1988). Should this kind of justification be applied?

There are many aspects to be considered before Queensland automatically follows the other states. Some consideration should be given to whether the safeguards are really adequate.

Some Issues for Consideration are:

The types of matters that warrant careful consideration before such a power is granted include (but may not be confined to) the following:

- For what types of crimes should police be granted the power to phone tap?
- Should warrants be necessary in order for police to phone tap? Are there circumstances in which the police should be allowed to phonetap without a warrant?
- If warrants are to be required what types of considerations should determine whether the warrant will be granted?
- Should warrants be issued by justices of the peace, District Court Judges, or Justices of the Supreme Court?
- Should there be some independent monitoring system to ensure that this highly invasive power is not abused? Should specific penalties apply to abuses of phone tap powers?

OTHER INVESTIGATIVE TECHNIQUES

Indemnification of Witnesses

In connection with his comments on police powers, Mr. Fitzgerald, Q.C. (Fitzgerald Report 1989) also raised the question of indemnification of witnesses. While the decision as to indemnification of witnesses is not a decision of the police but of the Attorney-General, it is a matter which aids in the investigation of offences and as such warrants consideration in this paper.

The outcome of the recent trial in Victoria of four people accused of the "Walsh St Murders" of two police officers, has brought to the fore the question of indemnification of witnesses. The major crown witness in that case was an indemnified witness who claimed to have been an accomplice to the murders. His evidence was seriously discredited and the four accused were acquitted.

This raises issues as to the usefulness of an indemnified witness in the investigation and prosecution of crime.

Mr. Fitzgerald (1989, p. 178) said in his report:

> "Informants and other minor participants in crime should be encouraged to talk about the major crime figures they support.
>
> The code of silence by which major crime figures are protected must be broken down, and this may be achieved by giving minor participants an incentive to talk and a disincentive to accept any punishment that might be imposed.
>
> It might be appropriate to give street-level drug suppliers, for example, a lesser penalty (and perhaps even charge them with a lesser offence) if they reveal their sources of supply. If they were not willing to do so, they could be made liable to an increased penalty. The same principle could apply to all crimes where lesser figures must know the identity of the next criminal in the hierarchy, just as S.P. bookmakers must know their principals, and brothel owners must know the managers.
>
> If degrees of culpability for such crimes were to be clearly categorised, it may be desirable to make formal legislative arrangements for lesser culprits to be treated as the principals (and therefore get heavier penalties) unless they were prepared to disclose the identity of the true principal."

To what extent if any, should Mr. Fitzgerald's suggestions be implemented?

Some Issues for Consideration are:

- Should major participants in crime be indemnified?
- If so, under what circumstances?
- Does the public interest in solving the crime outweigh the interest in punishing all offenders?

Entrapment/Agent Provocateur

Entrapment has been defined by the Australian Law Reform Commission (1975, p. 108) as:

> "inducing the commission of an offence which the person induced would not otherwise have committed on the occasion in question, either with the entrapper or anyone else."

It has been used by police in relation to homosexual offences, soliciting for prostitutes, offences concerning the illegal sale of drugs or liquor - offences made difficult to detect because of the secrecy surrounding them and the absence of complaining victims.

If not properly regulated, this conduct on the part of police or their agents, can amount to assisting, procuring, counselling or soliciting the commission of an offence. Should police be allowed to act as agent provocateurs, encouraging defendants to commit crimes that they may otherwise not have contemplated?

The courts in Australia have on occasions exercised their discretion to exclude evidence obtained by entrapment. Whether the evidence is admitted will depend on a variety of factors including the method of entrapment employed, the nature and gravity of the suspected offence and the type of investigation required.

Some people in the community abhor the use of "trickery" in such a manner. On the other hand, it has been recognised by some as serving a useful purpose in limited circumstances. Lord MacDermott said (*R v Murphy* [1965] NILR 138 at 147-148):

> "Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plain clothes and, regrettable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected without occasional resort to it."

The Australian Law Reform Commission report suggested three ways of sanctioning against the practice of entrapment - the concept of a defence of entrapment,[34] the creation of a rule of mandatory exclusion of the evidence so obtained, and the operation of a reverse-onus discretionary exclusionary rule of evidence.

The Commission was reluctant to endorse the first option because the creation of a new defence would really be beyond the terms of reference of the Commission.[35]

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34 As is the case in the United States - see A.L.R.C.R. 1990, p. 108 for a further discussion.

35 It would involve an excursion into substantive criminal law matters and the terms of reference were limited to procedural matters.

The second option raised a problem in actually defining the rules upon which the evidence was to be excluded, with enough precision to ensure that more problems were not created.

The third option was preferred and the Commission endorsed Professor J.D. Heydon's (1973, pp. 285-286) explanation of the rationale for the rule:

> "The issue of improper police conduct when it arises in such areas as confessions, the Judges' Rules, illegally obtained evidence, and faulty identification procedures goes to admissibility rather than guilt. It is for the legislature to state what conduct is criminal, but it is for the courts to control what forms of evidence are brought before them in proving it. Indeed entrapment is more serious than other forms of improper conduct in two respects. First, the other forms of impropriety are merely methods of collecting evidence, whereas entrapment causes the substantive commission of the crime by accused. Secondly, if entrapment does not lead to the exclusion of the evidence, and if it is not a ground for prosecuting the trapper, there is no other sanction against its use; in other forms of misconduct at least the victim has a civil action or the possibility of prosecuting the guilty policemen. Sometimes the exclusion of the evidence will lead to acquittal, but not always; there may be other evidence.
>
> In determining whether the evidence should be excluded, some account could be taken of such circumstances as the difficulty of detecting the crime discovered by ordinary means, the prevalence and seriousness of the crime, and the normality of the inducement, whether the inducement was offered deliberately or accidentally, and whether there were circumstances of urgency or emergency. The status and personality of the trapper may also be relevant; a policeman, who is responsible to trusted superiors, is governed by well-established codes of behaviour and has to meet minimum standards of character, intelligence and honesty, will generally be in a different position from a private trapper working for the Police Force for some consideration; purely private informers are even less reliable for they are not working for an organised institution charged with the duty of detecting guilt with its inherent controls and guarantees of reliability. If the above suggestions are sound, when an entrapment issue arises the judge would direct as follows. First he should ask himself whether the evidence should be admitted at all, after considering the factors we have just listed. If so (as will often be the case), he should remember that the accused is technically an accomplice and give the jury whatever warning the general law requires. Then, if the accused is convicted, he should make allowance in his sentence for any grievance the accused may feel and any police behaviour which requires adverse notice or deterrence. In a very bad case, the evidence will be excluded and the prosecution will fail in the absence of other evidence; if it succeeds, a very lenient sentence may be inflicted, and the judge may suggest the prosecution of trappers guilty of any offences. The latter course should not be taken lightly because it is undesirable to discourage police acting properly though in some technically illegal ways; it is open because trappers often do break the law.
>
> It is thought that what has been suggested represents a reasonable compromise between the need to avoid tempting the weak unduly, the need of the state to collect evidence of persistent offenders, and the public interest in proper police standards."

These are just some of the options available for dealing with evidence obtained by entrapment.

Some Issues for Consideration are:

- In what circumstances, if any, should the police be allowed to use the practice?

- How should evidence so obtained be treated by the courts?

Road-Blocks

With the exception of provisions such as the Public Safety Preservation Act which deals with major accidents and terrorist situations, currently the Queensland police have no power to set up a road-block.

Consequently, the common law authority of a police officer to locate offenders and bring them to justice is relied upon. As you will appreciate this common law duty must be interpreted very broadly to allow roadblocks to come within its ambit. At this stage that authority has neither been confirmed nor excluded by the courts.

A road-block involves the stopping of every vehicle on a particular road in order to establish whether an offender, victim or other evidence of an offence is contained therein. Such a power would necessarily involve stopping each vehicle for sufficient time to enable a search of the vehicle to be carried out.[36]

The establishment of a roadblock has a number of very significant advantages for law enforcement:

- it may ensure the quick capture of a dangerous offender,

- assist in the rescue of a victim of an abduction,

- a greater number of members of the community in the particular area where the offender or victim is being sought will be made aware of the police search for that person. Consequently, the urgency in locating the offender or victim will be reinforced to members of the community who are then more likely to consciously watch out for the offender or victim.

Generally the benefit of such a power is that it may make immediate apprehension of an offender more likely. To be weighed against that is the inconvenience occasioned to innocent road-users.

A road check differs slightly from a road-block in that it provides for the police to stop only vehicles fitting the description of the suspect's vehicle.

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36 The Police do have some powers under the Traffic Act to stop vehicles eg. for Random Breath Testing.

Some Issues for Consideration are:

- Should the police have a power to set up a road-block or a road check?
- If so, should it be limited only to serious offences?
- Upon whose authority should the road-block/road check be set up and on what grounds?
- Should police be required to disclose the reason for the stop and search?

Crime Scene Preservation

When an offence is reported police will respond to that report by immediately proceeding to the location of the offence and sealing off that area in order that all available evidence which might tend to identify the offender is preserved.

However, it is often the case that valuable scientific evidence is lost to investigators due to the actions of people accessing the crime scene, i.e. the actual place where an offence is alleged to have occurred. Albeit unintentionally, a person might very well destroy fingerprints by touching items at a crime scene or damage foot impressions or minute forms of evidence such as hair, semen, or blood spots by simply walking over them.

There is no specific statutory law which enables police to seal off a crime scene and either exclude or remove persons who may wish to enter.

A search warrant under the provisions of section 679 of the Criminal Code may be obtained by police. This warrant authorises police to search for evidence. However, it does not provide for the exclusion or removal of non-essential persons from the crime scene. Nor it is argued, can it be obtained quickly enough to allow for the immediate entry to and protection of an exposed scene in the case where natural elements intervene such as rain which might damage or wash away evidence.

Other than a search warrant, police are restricted to charging a person who knowingly disturbs or attempts to disturb a crime scene with an offence of hindering police in the execution of their duty under the provision of section 59 of the Police Act. However, this is a reactive measure in that it does not assist in the preservation of evidence but merely punishes a person for disturbing evidence.

Additionally, should a crime scene be located on private property there is no general power for police to enter that property and make any necessary examinations without first obtaining a search warrant or the permission of the occupier. It is acknowledged that in the normal course of events the occupier will co-operate fully with police and permit entry to the property. Indeed, it is

the occupier who normally reports the offence to police. However, where the alleged offender is the occupier of the property on which an offence has occurred, one might expect a degree of reluctance on the part of that occupier to permit police to enter.

Police have suggested that the problem could be overcome by granting them authority to remove or exclude any person from the scene of a serious offence where it is necessary to do so in order to preserve evidence.

While it seems only reasonable to allow police to take whatever steps are necessary in order to protect evidence, care must be taken in giving police powers which infringe the rights of individuals. For example, if an occupier of a house has seriously assaulted another member of the household, police would wish to enter the house and observe the scene of the offence before the occupier has destroyed any evidence. The argument against such a power is that it would enable police to intrude upon a person's home on the basis of an allegation that an offence has been committed.

The scope for abuse by vexatious neighbours etc. is a matter which ought to be borne in mind. One would not like to see a situation where police can enter a property and remove persons who have done no wrong, because an allegation has been made that a crime has been committed on the premises.

Even if an offence has been committed, what if neither the offender nor the victim wish to involve police? Should police have a power to preserve the scene of the crime in such a case?

Clearly in the majority of cases, it is simply a case of protecting the scene from damage caused by onlookers and media representatives. In such an important area, the role and duties of the police ought to be clear.

Issues for Consideration:

- Should the police have a power to enter private property in order to preserve the scene of a crime or an alleged crime?
- If so, should it be available in respect of all offences or just serious offences?
- Should such a power include a power to remove or exclude persons, even the owner of the property?

THE NEED FOR A COMPREHENSIVE REVIEW

The preceding pages are by no means a comprehensive coverage of the issues surrounding the use of police powers. It has been demonstrated that the topic is a complex one and has significant ramifications for our whole criminal justice system. Piecemeal changes to individual statutes in the past have led to the creation of this complicated system of police powers. It is suggested that any future action needs to deal with the problems in a more holistic manner.

If it is considered that police need more powers, other issues arise which must be dealt with, such as:

- the extent to which police are accountable for the exercise of the powers;
- the establishment of an ongoing system to monitor the effectiveness of any increase in power;
- whether legislation conferring increased powers, or at least specific sections of such, should be subject to a sunset clause, limiting its operation to a specific time period during which the use of the power can be monitored to see whether it has achieved the aims sought;
- whether the legislation conferring powers on the police should be consolidated;
- the financial implications of any proposed changes.

As part of a comprehensive review of police powers it is necessary to try to ascertain the particular areas of police work in which the most difficulty is encountered. In this respect the Commission intends to analyse the calls for service of some sample areas to gauge the extent of police work concerning different types of offences.

It is also important to look at how much police time is spent on matters unrelated to criminal investigation. It may be that many of the functions performed by police could be carried out by other agencies/persons and that those duties need not be performed by persons with such extensive powers as police officers.

There is a shortage of empirical evidence to demonstrate how the lack of a particular power has affected the outcome of a case. This causes great difficulty in trying to establish a real justification for a particular power. In granting a particular power it is necessary to determine how often it could be used effectively so as to weigh up the benefits to be obtained as against the intrusion upon the liberty of the individual.

Mr. Fitzgerald, in his report, stated that it is vital that the need for external controls be recognised and observed consistently. In his view, that is the only way in which the community can be satisfied that potentially intrusive powers are being used only to combat major and organised crime and only when they are needed in the public interest with minimum compromise of the rights of the individuals.

As a final point, Mr. Fitzgerald also recognised that it is not enough to merely give police more powers. Whatever powers are granted to the police, it is beyond dispute that there needs to be appropriate instruction about the ambit and exercise of their power.

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